

# TRANSCRIPT OF RECORD

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Supreme Court of the United States  
OCTOBER TERM, 1917

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No. 211

T. H. SMALLWOOD, W. F. SMALLWOOD, A. D.  
SMALLWOOD, ET AL., ETC., PETITIONERS,

vs.

JUAN G. GALLARDO, TREASURER OF PORTO  
RICO

No. 212

ADOLFO VALDES ORDONEZ, SALVADOR GARCIA,  
VICTOR OCHOA, ET AL., ETC., PETITIONERS,

vs.

JUAN G. GALLARDO, TREASURER OF PORTO  
RICO

No. 213

INSULAR MOTOR CORPORATION, PETITIONER,

vs.

JUAN G. GALLARDO, TREASURER OF PORTO  
RICO

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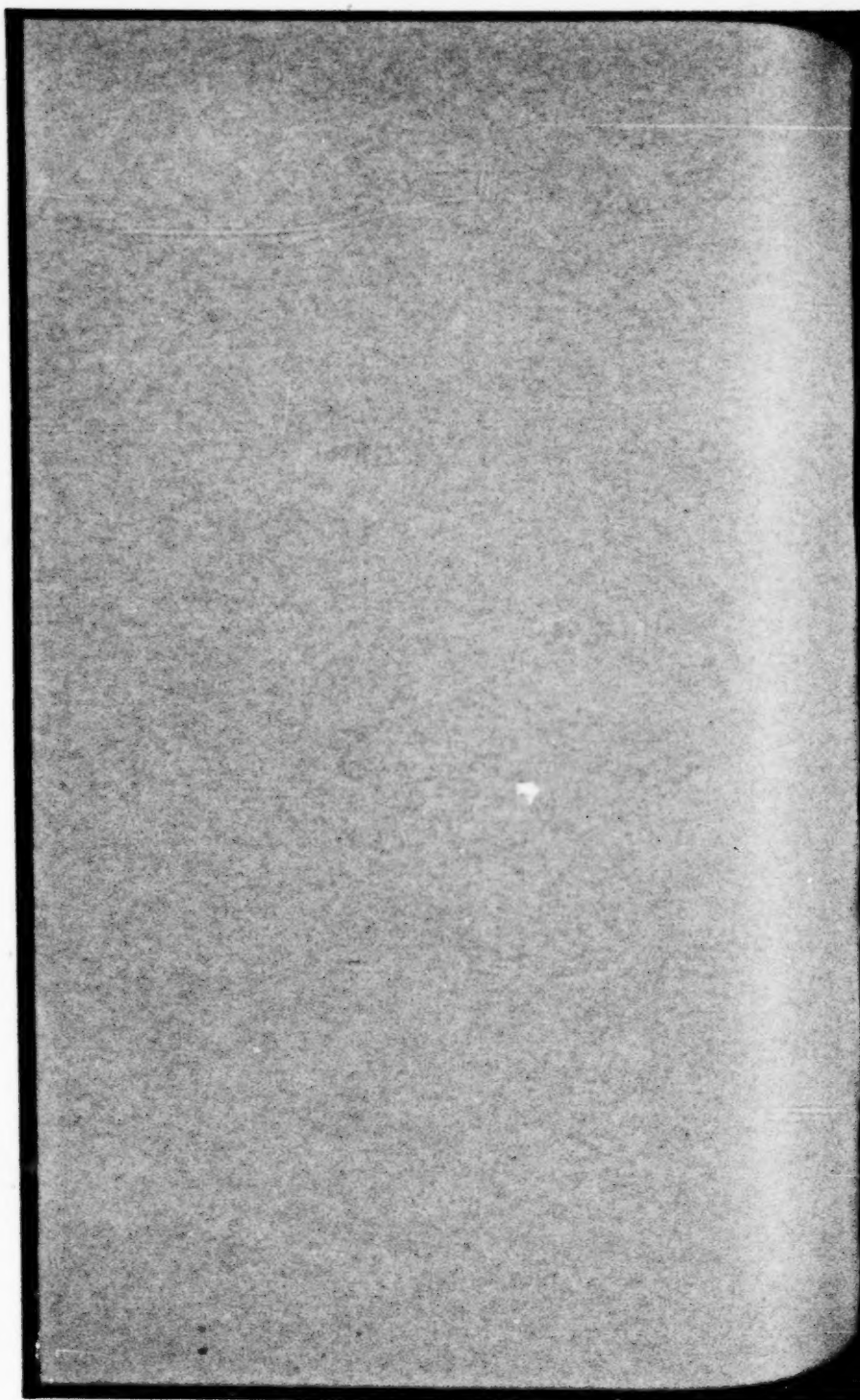
ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIRST CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

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T. H. SMALLWOOD, W. F. SMALLWOOD, A. D.  
SMALLWOOD, ET AL., ETC., PETITIONERS,

VS.

JUAN G. GALLARDO, TREASURER OF PORTO RICO

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**No.**

INSULAR MOTOR CORPORATION, PETITIONER,

VS.

JUAN G. GALLARDO, TREASURER OF PORTO RICO

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIRST  
CIRCUIT

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**UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

OCTOBER TERM, 1926

No. 1904

T. H. SMALLWOOD et al. (SMALLWOOD BROTHERS), Plaintiffs,  
Appellants,

v.

JUAN G. GALLAGHER, Treasurer, Defendant, Appellee

No. 1908

ABRAHAM VALDES OLIVERA et al., Plaintiffs, Appellants,

v.

JUAN G. GALLAGHER, Treasurer, Defendant, Appellee

No. 1943

INSULAR MOTOR CORPORATION

v.

SAME

Appeals from the District Court of the United States for  
the District of Porto Rico

From Final Decrees (Wells, J.), January 18, 1926, and  
September 18 and 30, 1925.

## Transcript of Record

Certified Copy of Record and All Proceedings in Said Causes to and Including February 2, 1927

[fol. 1] IN UNITED STATES DISTRICT COURT, DISTRICT OF  
PORTO RICO

No. 1285. Equity

T. H. SMALLWOOD, W. F. SMALLWOOD, A. D. SMALLWOOD, E. A. SMALLWOOD, G. C. SMALLWOOD, George A. Stuckert, Doing Business under the Firm Name of "Smallwood Brothers," Complainants,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico, Defendant

Bill to Recover an Illegal Tax and for an Injunction

AMENDED BILL OF COMPLAINT—Filed August 14, 1925

To the Honorable Ira K. Wells, Judge of the District Court of the United States for Porto Rico:

Now come the complainants above named, by the undersigned solicitor, and respectfully show:

[fol. 2] 1. That the complainants are all of age, citizens of the United States, some of them residents of Porto Rico, and others of the Republic of Panama, as follows:

T. H. Smallwood, W. F. Smallwood and George A. Stuckert are residents of San Juan within this district, and A. D. Smallwood, E. A. Smallwood, G. C. Smallwood and Ella Smallwood are residents of Panama.

The defendant Juan G. Gallardo is an American citizen and the Treasurer of Porto Rico, with residence within this district, duly appointed and qualified, and acting as such Treasurer during all times referred to in this amended bill of complaint.

2. The complainants do business in Porto Rico under the firm name of "Smallwood Brothers"; and their only and exclusive business consists in the sale of automobiles and automobile accessories, and each and all of the goods and

merchandises sold by the complainants in their regular course of business are manufactured, produced and built in the United States, principally in the States of Michigan and New York, and brought into Porto Rico under regular invoices and bills of lading showing the state from which they are thus brought within the jurisdiction; said goods, wares and merchandises being sold by the complainants to the public at large in exactly the same conditions in which they are brought into Porto Rico without any process of further manufacture, or improvement or betterment than that of their original condition.

And complainants allege that they are engaged in the importation of auto cars from the United States to be sold in Porto Rico; that the complainants have invested in said business more than one hundred thousand dollars and the continuation and development of said business is based entirely upon the importation of motor cars from the United States as aforesaid; that the complainants have imported during the past twelve months motor cars on which taxes hereinafter mentioned would exceed the sum of twenty thousand dollars; all of which is levied against importations upon goods manufactured in the United States and [fol. 3] imported therefrom; that complainant is and will continue to import said goods during this year upon which, unless the relief herein invoked is granted, it will be compelled to pay the said taxes to an amount of not less than twenty five thousand dollars; that the value of motor cars made in the United States to be imported by the complainant this year will amount to not less than two hundred thousand dollars.

3. That the Legislative Assembly of Porto Rico passed an Act, which was duly approved by the Governor, on the twenty eighth day of July, 1923, entitled "An Act to provide revenues for the People of Porto Rico by levying certain excise and license taxes for the practice of certain professions, industries or business; to regulate the manufacture, use and sale of alcoholic preparations and other articles; to impose certain penalties; to repeal the excise and license tax laws now in force, and for other purposes; which act subsequently amended by an Act of August 27, 1923, and by another Act of June 23, 1924;" said act-

being commonly known as the Excise Tax Law of Porto Rico; and that by virtue of Tax Law an Excise Tax upon the goods, wares and merchandises, sold by the complainants, which complainants allege is an illegal oppressive and wrongful tax, for the reasons to be hereinafter alleged, is provided for as follows:

"Section 20. That there shall be levied, collected and paid, for one time only, as an internal revenue tax on each of the following articles: \* \* \*

18. Motor vehicles. On every motor vehicle, automobile, motor cycle, aeroplane, hydroplane, dirigible, side car for motorcycles, motor for automobiles, bicycle, launch, auto-truck chassis, auto-wagon, auto tractor, parts and accessories for all of the aforesaid articles, solid or pneumatic tires, inner tubes therefor, excluding tools, screws, tube-valves, spark plugs and light bulbs, piston rings, felt washers, steel ball-bearings, lamp lenses, radiator rubber tubes, clamps therefor, vibrators and tire tube patches, produced, [fol. 4] manufactured, sold or used in Porto Rico, a tax of ten (10) per cent ad valorem.

Persons, not residents of Porto Rico, using their own automobiles for personal use only, shall be exempt from payment of tax for a period not to exceed sixty days from the date when they began to use said automobile. On the expiration of that period, or before, if the automobile is destined for other purposes than the above mentioned, the tax shall be paid."

4. Complainants respectfully allege that in said law the following sections have determined the procedure to make such illegal and unlawful tax effective, and prescribing penalties for the refusal to pay said tax:

"Section 21. The Tax hereby prescribed on articles for sale, use, consumption or exhibition in Porto Rico, except as provided in Section 20 of this Act, shall be levied as soon as they are on the market in possession of a dealer or commission merchant or the representative thereof in this island, who shall be responsible for the payment of said taxes upon transferring said articles to another dealer or consumer, or upon acquiring them or having them in his

possession, and who shall pay such taxes in one of the two following forms in accordance with such regulations as the Treasurer of Porto Rico may prescribe for the purpose: (a) Upon acquiring the taxable articles and having them in his possession, by making entries of receipt and delivery in the stock and receipt and delivery book, and by simultaneously paying the tax by cancelling the corresponding stamps on an internal revenue invoice; or (b) as he disposes of the taxable articles. Persons acquiring taxable articles through channels other than the aforesaid dealers or commission merchants or their representatives, shall pay said taxes as soon as they obtain possession of the articles and in accordance with the definition of *ad valorem* contained in this Act.

[fol. 5] "Dealers shall be responsible for the payment of said tax when he acquires taxable articles, if such tax shall not have been paid.

"Section 34. All persons dealing in taxable merchandise, or who have or shall have had such merchandise in store, shall furnish the Treasurer of Porto Rico or his duly authorized representatives, all such information as may be required of them in connection with said merchandise.

"Section 35. From and after the date on which this Act takes effect, every person acquiring any taxable articles for his personal use or consumption, on which the tax specified in this Act has not yet been paid, shall, as soon as coming into possession thereof, file an affidavit, with the Treasurer of Porto Rico, stating the class and quantity of the articles acquired, their value, and any other information that the Treasurer of Porto Rico may by regulations prescribe.

"From and after the date on which this Act takes effect, every person, who by himself or through his agents or representative, acquires taxable articles for sale or transfer to another merchant or consumer, and on which the taxes specified by this Act have not been paid, shall keep in his commercial establishment, from which it shall not be removed, except by authorization of the Treasurer of Porto Rico, an official book wherein entries shall be made of all taxable articles at the time they are acquired, and the corresponding entry at time of selling or otherwise

disposing of them, and further, furnish all other information that the Treasurer of Porto Rico may by regulation prescribe for the purpose of determining the value and other circumstances in connection with such articles; provided, That upon the taking effect of this Act, the stock on the market shall be classified as follows:

"(a) That on which the tax has already been paid;

"(b) That subject to the payment of taxes on which such taxes have not been paid;

[fol. 6] "(c) That which was not subject to the payment of taxes prior to the date on which this Act takes effect; Provided further, that merchandise already acquired under classes (a), (b) and (c), shall not be taxable under this Act, provided, further, that the Treasurer of Porto Rico is hereby empowered to adopt such necessary measures not in conflict herewith, as shall prevent any person from fraudulently evading or attempting to evade, the payment of taxes herein provided for, making merchandise acquired during the time this Act is in effect, appear if acquired prior to the date on which it takes effect; And, provided, further, that every person who, availing himself of such means shall evade or attempt to evade payment of said taxes, shall be deemed guilty of misdemeanor, and when the court in whose jurisdiction the offense has been committed convicts such persons, he shall be fined in a sum of not less than one hundred (100) dollars, or shall be sentenced to prison for a term of not less than thirty (30) days.

"Section 36. That articles subject to tax, used by agents or commission merchants as samples for the purpose of soliciting business, shall be exempt from the payment of the said tax upon furnishing a bond in such amount and in such form and condition as the Treasurer of Porto Rico may demand, and if for any reason the said articles shall be disposed of for consumption or use in Porto Rico, the excise tax, as prescribed in this Act, shall be paid thereon.

"Section 37. That all taxes provided for in this Act shall be paid by affixing and cancelling internal revenue stamps on such documents and articles, as for such purposes the Treasurer of Porto Rico may prescribe. Such stamps shall be furnished by the Treasurer of Porto Rico, on requisition,

to collectors of internal revenue, in such quantities as may be necessary for local needs; Provided, that for the purpose of identification of certain taxable articles such as [fol. 7] perfumery, medicines, arms and others which, in the judgment of the Treasurer of Porto Rico, it may be necessary to identify so as to determine whether or not the taxes required by this Act have been paid, the Treasurer of Porto Rico is hereby authorized, through the promulgation of rules and regulations to cause to be affixed to the said articles stamps or other adequate signs which shall be furnished gratis to taxpayers by the Treasurer of Porto Rico; provided further, that the Treasurer of Porto Rico may affix such stamps on taxable articles acquired while former excise tax laws have been in force and which articles are in the market when this act takes effect.

"The lack of such stamps or signs on the articles required by regulations, shall constitute prima facie evidence that the tax has not been paid.

"Section 38. That every person who fails to pay the taxes herein prescribed, at such time and in such manner as this Act provided, except as otherwise herein determined, shall be guilty of misdemeanor, and the merchandise on which said tax has not been paid may be attached by the Treasurer of Porto Rico or by his agents and by him sold at public auction to indemnify the People of Porto Rico for the sums defrauded by the violator.

"Section 39. That every person who shall have in his possession or has on any premises under his control, and merchandise subject to tax under the provision of this Act, on which such tax has not been paid, except such as are duly entered in the official book of a licensed manufacturer, or of a dealer, shall be guilty of misdemeanor, and the merchandise may be seized by the Treasurer of Porto Rico or by his agents, and by him sold at public auction to indemnify the People of Porto Rico for the amounts defrauded by the violator, and the license of such person, if a merchant, may be revoked."

[fol. 8] 5. That the Legislative Assembly of Porto Rico passed a law, duly approved by the Governor, on the 23d of June, 1924, entitled "An Act providing for the payment of taxes under protest, etc.," as follows:

"Section 1. Whenever a taxpayer believes that he should not pay a tax or part thereof because he understands that it is illegal, excessive or wrongful, he shall, however, have the obligation to pay the same in full upon request of the collector of taxes of his district, or of the official in charge of the collection of taxes, and shall ask the said collector or the said official in charge of the collection of taxes, should he desire to make any claim, to endorse the tax receipt specifically stating whether the said protest refers to the whole or to a part of the tax paid under protest, and setting forth the exact amount protested. The said endorsement shall be signed by the taxpayer and by the collector or officer in charge of the collection of taxes.

"Section 2. After payment is made, the collector of taxes or the official in charge of the collection of taxes, shall cover the sum collected into the Treasury of Porto Rico, reporting to the Treasury the total amount of the tax, as well as the part thereof paid under protest.

"Section 3. The moment that a tax paid under protest is received, the part thereof not protested, if there be any, shall be considered as all other receipts from taxes, the amount of which is to be applied to the obligations of the Insular Government, and in the case of property taxes the part of said tax pertaining to the respective municipalities pursuant to law, shall be paid over to them. The protested part shall be covered into a special fund to be known as 'Taxes paid under protest. Trust Fund.'

"Section 4. A taxpayer who shall have paid under protest the whole or part of any tax shall, within a term of not to exceed thirty days from and after the date of payment, sue the Treasurer of Porto Rico in a court of competent jurisdiction to secure the return of the amount protested. The Treasurer of Porto Rico, through the Attorney General or through the official designated by the latter from his department, shall answer the said suit within the term granted by law for the filing of answers and shall make therein, in their order, allegations to strike out particulars of the complaint and demurrers.

"When the case is ready for trial the court before which the action is pending shall fix the day for the trial thereof without the necessity of a request from the parties, first serving due notice on them.

"When final decision is rendered, if favorable to the taxpayer, the Treasurer of Porto Rico shall proceed to return to him the amount directed in the decision to be charged against the fund 'Taxes paid under protest—Trust Funds,' referred to in section 3 hereof.

"If the decision be favorable to the People of Porto Rico, the Treasurer shall cover from the fund known as 'Taxes paid under protest—Trust Fund,' into the proper fund such amount of the tax as directed by the court in its decision, turning over to the respective municipalities the proportion established by law in cases of property taxes.

"Section 5. Either party may appeal to a higher court by filing in the court a quo his appeal within ten days after the decision is rendered, as provided by section 4 of this act; provided, that if the taxpayer be the appellant he shall file, together with the petition for appeal and in the court appealed from, a bond in such sum as the court shall fix to answer for such costs, expenses, and damages as the People of Porto Rico might suffer by reason of said action.

"The said appeal shall prosecute pursuant to the provisions of law for appeals in civil cases, and the court of appeals shall hold the hearing with preference over any other matter pending before it.

"Section 6. Any taxpayer filing a suit against the Treasurer of Porto Rico in accordance with the provisions of this Act shall attach to the said suit a receipt for the tax paid under protest, or a certified copy of said receipt.

"Section 7. That the sum of fifteen thousand (15,000) dollars or such part thereof as may be necessary is hereby appropriated, out of any funds in the Insular Treasury, not otherwise appropriated, for the payment by the Treasurer of Porto Rico of such costs as by judgment of any competent court may be allowed to any taxpayer who shall have brought suit pursuant to this Act.

"Section 8. Act No. 17 of May 13, 1920, as well as all laws or parts of laws in conflict herewith are hereby repealed; provided, that any action, proceeding or right arising from and exercised under the act hereby repealed, shall continue under the protection and provisions thereof until its termination.

"Section 9. It is hereby declared that an emergency exists for the immediate taking effect of this Act, and therefore the same shall take effect immediately after its approval."

6. That in accordance with said acts of the Legislature of Porto Rico as hereinbefore stated the complainants are bound by the very nature of their business and occupation to pay an oppressive duty upon every article, goods, wares or merchandises brought from the United States into Porto Rico amounting to 10 per cent ad valorem over said goods, wares and merchandises, and if said excise duty would be paid under protest the complainants would be bound to make a protest for every case whenever a sale is effected, amounting to several thousand in one single year; and complainants would be bound to file a suit in every case protested in order to recover the amount of the excise, all of which would amount to a multiplicity of suits and legal proceedings of an unwarranted amount and put the complainants to great expense of time and money.

7. That by an Act of Congress of the United States of America of April 12, 1900, it was enacted:

[fol. 11] "Whenever the Legislative Assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this Act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date, all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico."

And by another act of Congress of March 2, 1917, it was enacted:

"Section 38. That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this

Act, including the laws relating to tariffs, customs, and duties on importations into Porto Rico prescribed by the Act of Congress entitled: 'An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes,' approved April twelfth, nineteen hundred, are hereby continued in effect, and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed."

8. That the complainants have been threatened by the agents of the defendants with the seizure of their property and confiscation thereof to apply the proceedings of their sale to the payment of the illegal excise tax imposed upon the wares, goods and merchandises the property of the complainants, brought from the United States into Porto Rico as aforesaid; and under fear of said threat the complainants have paid the said excise duty upon a certain car, to wit, a Ford car imported from the United States on the [fol. 12] 18th of June, 1924, making known their protest against such excise duty as illegal and in open violation of the laws of the United States. And complainant alleges that by the General Tax Laws of Porto Rico the complainants are taxed and pay upon the same property an annual tax of two per cent ad valorem.

9. And complainants allege that they verily believe that the defendant personally or by his agents will immediately proceed to seize and confiscate all the properties of the complainants consisting in goods, wares and merchandises brought from the United States into Porto Rico to be sold in this island exactly in the same conditions in which they were manufactured in the state of their origin; and by doing so will cause permanent and irreparable injury to the complainants totally wrecking their business and depriving the complainants of their lawful property without due process of law.

Complainants allege that said tax is illegal, unlawful, oppressive and unconstitutional for the following reasons:

1. Because it constitutes double taxation inasmuch as in accordance with the General Tax Laws or Political Code of Porto Rico the same property at the same time and under the same conditions has been taxed with a previous tax ad

valorem, and with a previous tax on complainant's occupation; and with a previous sale tax.

2. Because it is an open violation of the laws of the United States that provide that in no event shall any duties of the kind complained of in this bill of complaint be imposed upon articles brought from the United States into Porto Rico.

3. Because the proceedings to make effective said tax are inquisitorial in their nature and really provide for the confiscation of the property of these complainants without due process of law.

4. Because the Act of the Legislative Assembly of Porto Rico provided for payment of taxes under protest is not applicable to excise duties, by the very nature of this tax; and because it would be impossible to make payments under [fol. 13] protest for every automobile or part of automobiles sold and then file a suit in the court of law for recovery of the tax paid.

And your complainants allege that they have no remedy at law to right the wrong of which they now complain.

Wherefore, inasmuch as the complainant is without adequate remedy at law or except in a court of equity, for the wrongs and grievances herein complained of, said complainant prays that the defendant herein, his agents and all persons under his authority, be perpetually enjoined and restrained from collecting or attempting to collect from complainant, under pretext of enforcing the Act of July 28, 1923, as amended, any tax of the articles mentioned in paragraph VI of the complaint herein, whether in the original packages or package or after delivery by the carrier in the original packages or otherwise, and imported from the continental United States and from embargoing, attaching, withholding or in any manner whatsoever interfering with said articles under the excuse or pretext that said defendant is enforcing said statute, and from in any manner enforcing or attempting to enforce against complainant herein, the provisions of said act as amended and from interfering with the property and business of complainant by embargoes or otherwise for the attempted collection of any tax provided for by said act and under the pretext that

said attempted collection is justified by the provisions of such act and from prosecuting complainant or prosecuting or arresting officers or employees of complainant for removing goods in the original package from the possession of the steamship company or express company or post-office, or for having in their possession goods, whether in the original package or otherwise, upon which said alleged tax has not been paid, or from removing or otherwise disposing of any such goods on which no tax has been paid, or for failure to produce upon demand of any internal revenue official a true and authentic invoice covering such goods in the original package, and from detaining and examining any package, original or otherwise, containing or supposed to contain articles taxable or alleged by defendant to be taxable under said act, and from holding or otherwise interfering with the same under the pretext of enforcing said act; and that pending the final determination of this cause, the defendant, and all persons under his authority, be enjoined pendente lite, from enforcing or attempting to enforce against the complainant any of the provisions of said statute above mentioned and from collecting or attempting to collect from complainant the tax on any of the said articles, and from embargoing, attaching or in any manner whatsoever interfering with the complainant's property or business under such pretext, and from prosecuting complainant or complainant's officer or employees under such pretext and from doing any of the acts mentioned herein above in this paragraph; and that defendant be further enjoined to immediately release and return to complainant all goods and merchandise of complainant seized or embargoed by defendant by reason of the failure or refusal of complainant to pay the said tax and complainant further prays that a subpoena issue, directed to the said defendant, commanding him to appear and true answer make to each and every of the matters and things hereinbefore set forth, but not under oath, an oath being hereby expressly waived. And complainant further prays for such other and further relief as to the court may seem just and proper under the circumstances and allegations of the complainant.

San Juan, Porto Rico, August 10, 1925.

Chas. Coll Cuetu, Solicitor for Complainant.

*Duly sworn to by Thomas H. Smallwood. Jurat omitted in printing.*

[fol. 15] IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY—August 14, 1925

This case comes on to be heard upon the bill and answer thereto. Come the plaintiffs by Cay, Coll y Cuchi and files a petition to the court praying that they be allowed to file an amended bill of complaint. The motion is argued by said counsel and J. A. Lopez Acosta in behalf of the Treasurer of Porto Rico. The amended bill is allowed to be filed and the answer of the defendant to the original bill of complaint is allowed to stand as an answer to the amended bill. The court hears testimony in behalf of the respective parties and takes the case under advisement. Fifteen days' time is allowed to the parties to file briefs.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed April 25, 1925

To the Hon. Arthur F. Odlin, United States District Judge:

Now come the Attorney General of Porto Rico and undersigned counsel, in behalf of Juan G. Gallardo, as Treasurer of Porto Rico, and respectfully allege:

1. That this court has no jurisdiction to hear and de-  
[fol. 16] termine this injunction suit, because the amount therein involved does not exceed \$3,000.

2. That the complaint herein filed does not state facts sufficient to constitute a good cause of action in equity:

(a) Because the plaintiff in this case has an adequate, sufficient and speedy remedy at law by payment under protest, under Act No. 9, approved June 23, 1924.

(b) Because this injunction is filed against the defendant, Juan G. Galardo, in his official capacity as Treasurer

of Porto Rico, and according to the laws of Porto Rico, an injunction has not been authorized against said officer of the Government, nor against the People of Porto Rico, which he represents.

(c) Because it does not appear from the facts alleged in the complaint that there is an intentional discrimination adopted as a practice by the defendant to injure the property of the plaintiff, a simple allegation of the unconstitutionality of the law being insufficient.

Wherefore, your defendant prays the court to dismiss the bill of complaint filed herein, with costs.

San Juan, Porto Rico, April 18, 1925.

H. P. Coats, Attorney General of Porto Rico. R. H. Todd, Jr., of Counsel. J. A. Lopez Acosta, of Counsel.

Copy received this eighteenth day of April, 1925.

Cay. Coll Cuchi, Attorney for Complainant.

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[fol. 17] IN UNITED STATES DISTRICT COURT

OPINION AND ORDER GRANTING INJUNCTION—JUNE 2, 1925

OWEN, J.:

The brevity of the opinion in this case must not be construed as evincing either in appreciation by this court of the very great importance of the case or as indicating a lack of thorough consideration and study. The questions involved have been argued with great skill by the eminent counsel representing the litigants, and the court has examined every decision cited in the elaborate briefs which have been filed.

It is proper that the first point to be discussed is the effect to be given by this court to a very important decision cited by counsel on each side, which decision was rendered by the Supreme Court of Porto Rico on March 11, 1925, in the case of the Benitez Sugar Company against Ramon Aboy, Jr., who was formerly Treasurer of Porto Rico. This

decision was written by Mr. Justice Wolf and concurred in by all the other members of the court. It is my opinion that the conditions surrounding the litigation in the present case are quite different from the conditions which surrounded the litigation in the Benítez Sugar Company last mentioned. Upon the point in connection with the payment of taxes under protest, the decision by Judge Wolf refers to an act of the Porto Rican Legislature, number 17, enacted in 1920. My opinion is clear that this act passed in 1920 did not provide an adequate and complete remedy at law for a tax payer who claimed that the Treasurer was seeking to enforce payment of taxes which were illegal, unconstitutional, null and void, by making payment under [fol 18] protest. That this view is correct seems to be borne out by the fact that this act of 1920 was subsequently repealed by the Porto Rican Legislature by an act which was approved June 23, 1924, being number 9 and is entitled as follows: "An Act providing for the payment of taxes under protest; establishing a procedure to authorize the collection and return thereof; to create a special fund; to repeal Act No. 17 of May 13, 1920, and for other purposes." This act of June 23, 1924, has been examined with great care. It specifically provides that a taxpayer believing that the tax imposed against him is illegal shall have the right to pay the same under protest and bring a suit in any competent court, within thirty days thereafter, against the Treasurer of Porto Rico, asking for the return of the amount protested. The money so paid shall be covered into a special fund to be known as "Taxes paid under protest—Trust Fund." Part of Section 4 provides that if a decision be rendered by the court favorable to the tax payer, the Treasurer of Porto Rico shall proceed to return to the tax payer the amount directed in the decision. This means that if the court shall find that the tax is illegal, the court shall have power to allow all the costs to the taxpayer, and the court may, as it should, allow reasonable attorney's fees to the counsel for the tax payer.

An examination of the numerous decisions cited by counsel in this present case convinces me that this recent act of 1924 does provide a plain, adequate and complete remedy at law for the buyer of a single automobile upon

which a tax is imposed; but I am clearly convinced that where a concern is engaged in the constant sale of automobiles, all of which are brought into Porto Rico from the United States, and where during one week a sale of one automobile may be made, and during the following week a sale of two automobiles may be made, and during the following week a sale of three automobiles may be made, resulting in a large and important business, amounting to something like \$200,000 in the course of a year, the taxes upon which would reach a total of \$20,000, more or [fol. 19] less, as alleged in this bill and not denied by the defendant, it would be a very gross hardship that the utilization of this act of 1924, by making constant payments under protest and bringing constant suits, would unquestionably result in a multiplicity of suits, which is a very important head of equity jurisdiction. It therefore follows that the first point raised by counsel for the defendant is entirely without merit and scarcely needs discussion. This point denies the jurisdiction of this court because the amount involved does not exceed \$3,000. Likewise as to the second point relied upon by counsel for the defendant, that this new act of 1924 provides an adequate, complete and plain remedy at law, which operates to defeat the power of an equity court to intervene by an injunction. It seems to be beyond question that this point has already been shown to be without force by what has been stated above. Coming to the third point of the brief filed by counsel for the defendant, it is claimed that this proceeding should be dismissed because of misjoinder. It is claimed that there has been united in one proceeding an action of equity and an action at law. This is based upon one clause of the prayer of the bill to the effect that this court direct the return to the complainant corporation of a small sum of money paid by the complainant corporation under protest previous to the filing of this bill.

I am of the opinion that this point is well taken. It seems to me plain that where a taxpayer claims that the tax is illegal, sees fit to avail himself of the provisions of this recent act of 1924, and makes payment under protest, he should be estopped to ask a court of equity to grant him re-

lief as to that particular item. However, it will be observed that on page 12 of the brief filed by counsel for the complainant, it is stated that they stand ready to strike out that part of the prayer asking for the return of that small item which was paid under protest; therefore, the bill will be deemed as filed with the prayer eliminating that request.

The fourth point relied upon by counsel for the defendant is that no injunction proceeding can be brought against the defendant in his official capacity against the laws of Porto [fol. 20] Rico. This point is entirely without merit. The Supreme Court of the United States has decided over and over again that if a tax is unconstitutional, and if there does not exist a plain, adequate and complete remedy at law, and if the amount involved does exceed \$2,000, a Federal court has full power to entertain an application for an injunction against the proper taxing officer of the State whose legislature has imposed such unconstitutional tax. In a case of this nature no diversity of citizenship is required. Of course, the act of Congress specifically provides that where such a suit is brought in a Federal court existing in any one of the forty-eight States of the Union, three District Judges must sit and the burden of the responsibility of the decision does not rest upon one single District Judge. The remote and non-contiguous geographical location of Porto Rico is such, however, that the Circuit Court of Appeals of the First Circuit decided several years ago that this provision of Congress applied only to Federal courts within the limits of the forty-eight states of the Union, and that it was proper for the Federal District Judge in the Island of Porto Rico to entertain a suit of this nature. It is unnecessary to state that it would be much more gratifying to the writer of this opinion if he could have had the assistance in this important matter of two other District Judges, but inasmuch as the Circuit Court of Appeals for the First Circuit has held that it is the duty of the District Judge in Porto Rico to hear and determine a suit of this nature sitting by himself, there is nothing for the judge presiding over this court to do but to hear the case, consider it and decide it alone, as best he can.

Coming now to the question of the tax itself, counsel for the defendant impliedly concedes, in accordance with the de-

cision of the Supreme Court of Porto Rico, first above cited, that the law of 1921 violated the Constitution of the United States, and also violated the Organic Act of 1917, known as the Jones bill. The law of 1921 provided a tax of 10 per cent upon all automobiles produced, manufactured, introduced or brought into Porto Rico. The law of 1923 [fol. 21] slightly changed the language of the law of 1921 and imposed an ad valorem tax of 10 per cent on all automobiles produced, manufactured, sold or used in Porto Rico. It is claimed by counsel for the Treasurer of Porto Rico that this change of language makes valid that which was previously invalid. I am obliged to hold otherwise and a very brief illustration, coupled with the language of the Supreme Court of the United States in the case of *Galveston against Texas*, reported in the 210 U. S. 227, confirms my view. Let me illustrate. It will, of course, be conceded that the Legislature of Porto Rico can have no greater power than the Legislature of Michigan, or the Legislature of the State of Florida. The powers of the Legislature of Porto Rico are limited by the Act of Congress, passed in 1917, known as the Jones bill above referred to. It is a fact of common knowledge that the State of Michigan produces many automobiles and produces no oranges. It is a matter of common knowledge that the State of Florida produces no automobiles and produces many oranges. An immense number of boxes of Florida oranges go annually to the State of Michigan; and an immense number of automobiles manufactured in the State of Michigan go annually to the State of Florida. We will assume that the Legislature of Michigan should impose a tax of thirty cents on each box of oranges produced, manufactured, sold or used in the State of Michigan, exactly in accordance with the language in the act of 1923 passed here in Porto Rico; we will likewise assume that the State of Florida should pass an act imposing a tax of 10 per cent ad valorem upon each automobile produced, sold, manufactured or used in Florida. How could it be said that this would not be directly violative of the Constitution of the United States, as found in article one, section nine, sub-division five, and also in section ten, sub-division two, cited by Judge Wolf, in his opinion referred to above, which provision says that no tax or duty shall be laid on articles

exported from any State. Furthermore, no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws.

[fol. 22] In view of what has been stated above is no proper order for this court to make except to grant the injunction as prayed for by the complainants. At the same time, it is the duty of this court to protect the Treasurer of Porto Rico from possible loss in the event that this decision shall be erroneous.

It is, therefore, ordered that an injunction issue as prayed for by the complainants upon the giving by them of a bond, payable to the Treasurer of Porto Rico, and his successors in office, in the sum of \$50,000.

To this order and opinion counsel for the Treasurer of Porto Rico excepts.

Done and ordered in open court at San Juan, Porto Rico, this second day of June, 1925.

Arthur F. Odlin, Judge.

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IN UNITED STATES DISTRICT COURT

PRELIMINARY INJUNCTION—June 3, 1925

THE UNITED STATES OF AMERICA,

District of Porto Rico, ss:

The President of the United States to Juan G. Gallardo,  
Greeting:

Whereas, Smallwood Brothers, a corporation of Porto Rico, has filed on the chancery side of the District Court of the United States for the District of Porto Rico a bill against Juan G. Gallardo, and has obtained an allowance for an injunction, as prayed for in said bill. Now, therefore, we having regard to the matters in said bill contained, do hereby command and strictly enjoin you, the said Juan G. Gallardo, from collecting or attempting to collect from complainant under pretext of enforcing the Act of July 28, 1923, as amended, any tax of the articles mentioned in paragraph VI of the complaint herein, whether in the

original package or packages or after delivery by the carrier in the original package or otherwise, and imported from the continental United States and from embargoing, [fol. 23] attaching, withholding, or in any manner whatsoever interfering with said articles under the excuse or pretext that you are enforcing said statute, and from in any manner enforcing or attempting to enforce against complainant herein the provisions of said act as amended and from interfering with the property and business of complainant by embargoes or otherwise for the attempted collection of any tax provided for by said act and under the pretext that said attempted collection is justified by the provisions of such act and from prosecuting complainant or prosecuting or arresting officers or employees of complainant for removing goods in the original package from the possession of the steamship company or express company or post-office, or for having in their possession goods, whether in the original package or otherwise, upon which said alleged tax has not been paid, or from removing or otherwise disposing of any such goods on which no tax has been paid, or for failure to produce upon demand of any internal revenue official a true and authentic invoice covering such goods in the original package, and from detaining and examining any package, original or otherwise, containing or supposed to contain articles taxable or alleged by you to be taxable under said act, and from holding or otherwise interfering with the same under the pretext of enforcing said act; and that pending the final determination of this cause, you and all persons under your authority, are enjoined from enforcing or attempting to enforce against the complainant any of the provisions of the said statute above mentioned and from collecting or attempting to collect from complainant the tax on any of the said articles, and from embargoing, attaching or in any manner whatsoever interfering with the complainant's property or business under such pretext, and from prosecuting complainant or complainant's officers or employees under such pretext and from doing any of the acts mentioned herein above, which commands and injunctions you are respectively required to observe and obey, until our said District Court shall make further order in the premises.

Hereof fail not, under penalty of the law thence ensuing.  
[fols. 24 & 25] Done in open court this third day of June,  
1925.

Arthur F. Odlin, Judge.

Bond on injunction for \$50,000, approved and filed July  
18, 1925, omitted in printing.

[fol. 26] IN UNITED STATES DISTRICT COURT

ANSWER—Filed June 9, 1925

To the Honorable District Judge of the United States for  
Porto Rico:

Now comes the Attorney General of Porto Rico, and undersigned counsel in behalf of the Treasurer of Porto Rico, and in answer to the complaint herein filed, respectfully allege:

1. Defendant admits paragraph 1 of the complaint.

2. For want of information, defendant denies each and every allegation of paragraph 2 of the complaint, and especially that the goods, wares and merchandises sold by complainant, if any, are sold in the same condition in which they are received from the sellers in the United States; and defendant furthermore denies that complainant is engaged in the business of importation of cars; otherwise alleging that complainant's business is, as far as the knowledge received on information by defendant, the sale of automobiles after they are in the market and have become part of the mass of property of complainant, which sale is made not to specific persons but to anybody who happens to buy an automobile of the make or makes in stock in the hands of complainant. Defendant furthermore denies, for want of information, that the amount of money therein alleged as invested by said complainant in its business, or that the amount of taxes alleged in the complaint is the one that must be paid by said complainant. And defendant furthermore denies that the taxes involved in this suit and

under collection, and for which alleged distraint was threatened, reach the amount of \$3,000.

3. Defendant admits paragraph 3 of the complaint as to the approval, by the Legislative Assembly of Porto Rico, of the excise tax law of 1923, and the existence in said law of section 20, subdivision 18, taxing motor vehicles; but denies that the tax imposed and assessed by said law is illegal, oppressive or wrongful.

4. Defendant admits paragraph 4 of the complaint, as to the sections therein quoted, as forming part of Act No. 68 of 1923, as amended by Act No. 1 of August 27, 1923, and Act 6 of June 23 of 1924; and defendant furthermore [fol. 27] alleges that the collection of said taxes, as assessed in accordance with the aforesaid law, is regulated by the rules and regulations prescribed and issued by the Treasurer of Porto Rico, as provided in section 33 quoted, sections 41, 43 and 87, which read as follows:

"Section 41. That the Treasurer of Porto Rico is hereby authorized to remit the tax accruing on any merchandise under the Internal Revenue Laws of Porto Rico, upon presentation to him of satisfactory evidence of its destruction by fire or by force majeure and without any fraud, collusion or negligence on the part of the owner, consignee or other interested party, before such merchandise has been removed from the premises on which manufactured, place of business of the dealer or owner of the merchandise prior to its sale, or from any other place when the owner has not taken charge of same, and before such taxes have been paid, and he may, in his discretion, permit the destruction of any taxable merchandise when it has become unfit for sale or consumption without fraud, collusion or negligence of any kind on the part of the owner, consignee or other interested party before the removal of said merchandise from the premises specified in this section and before such taxes have been paid thereon; and in case of such destruction, he may exempt said merchandise from the payment of the internal revenue taxes accruing thereon."

"Section 43. That articles subject to taxation in accordance with the provisions of this act, shall be exempt from taxation when exported from Porto Rico, after such regulations have been complied with, entries made and such

bond furnished as the Treasurer of Porto Rico may prescribe."

"Section 87. The Treasurer of Porto Rico shall issue such regulations as may be necessary to enforce the provisions of this act not in conflict herewith; but until new regulations shall have been issued by the Treasurer, the rules and regulations at present in force shall continue in [fol. 28] full force and effect, provided they are not in conflict herewith."

Defendant furthermore alleges that the collection of the excise taxes, according to the rules and regulations now in force and according to the practice and procedure followed by the offices of the Department of Finance, are not collected every time an article assessed under the law is sold, but that said taxes are collected monthly, bi monthly, and sometimes for a longer period, when the amount due to the Treasurer of Porto Rico is sufficient to justify a payment under protest, in case that the taxpayers believes that the tax collected is illegal or excessive.

5. Defendant admits paragraph 5 of the complaint, as to the approval of Act No. 9 of June 23, 1924, providing the payment of taxes under protest and authorizing a procedure for the return thereof. Defendant furthermore alleges that said law, as is now in force, provides a sufficient, adequate and complete remedy at law to protect the rights of any taxpayer in the collection of taxes by the government, under any of the tax laws of the Island of Porto Rico.

6. Defendant denies each and every allegation of paragraph 6 of the complaint, and especially that the tax imposed by the excise tax law of Porto Rico is oppressive, or that if complainant was to pay under protest the taxes provided by said law, it would be compelled to file a multiplicity of suits and legal proceedings; otherwise alleging that the excise tax law of Porto Rico, as approved in the year of 1923 and amended in the same year by Act No. 1 and by Act No. 6 in the year of 1924, provides that the collection of the tax will be made according to the Rules and Regulations prescribed and issued by the Treasurer of Porto Rico; that according to the said Rules and Regulations, the payment of the taxes imposed by said law is requested, in some cases bi monthly, in some monthly, and in some after a

longer period of time, when the amount due to the government is large enough to be paid in one installment and the recovery of which would require only one legal proceeding [fol. 29] before a court of competent jurisdiction.

7. Defendant admits paragraph 7 of the complaint, as to the existence of the laws therein quoted; but defendant alleges that said laws are not applicable to the case at bar; because in the present case the tax imposed is not a tax on importation but a tax on the sale of the article, assessed when the property is in the hands of the taxpayer and forming part of its stock in trade, and when the article has become part of the mass of property of the seller; and that said tax is never collected until the property has been sold and has been transferred from the possession of the seller to that of the buyer, and when said article has ceased to be subject to the importation laws and is in the market for the object of commerce. Defendant furthermore alleges that when a tax has been levied, according to sub-division (a) of Section 36 of Act No. 1, approved on August 23, 1923, said tax is assessed by a special agreement between the taxpayer and the government, voluntarily made, and said taxes are paid by the taxpayer of its own volition and without any proceeding of distraint, attachment or in any other way affecting the property of the taxpayer.

8. In answering paragraph 8 of the complaint, defendant alleges that he admits that a collection was made from complainant, for the amount of \$42.84, paid by said complainant on a Ford car which had been sold by it at the time that the collection of taxes was made; but defendant denies that the collection of said tax was illegal or in any way confiscatory; and defendant furthermore denies that any property of complainant was seized, attached or confiscated for the payment of said tax; otherwise alleging that the practice followed by the Department of Finance with complainant, as well as with other taxpayers engaged in the same business in Porto Rico, is to collect the said taxes periodically and after the number of cars sold was sufficient to make a lump sum large enough to be paid in one installment, and without causing the plaintiff or the taxpayer an irreparable injury, or the filing of a multiplicity of suits to [fol. 30] recover the taxes paid. Defendant furthermore denies that any property tax is collected from complainant on automobiles sold, and to which the excise tax refers.

9. Defendant denies paragraph 9 of the complaint, and especially that the defendant, either personally or by its agents, will seize, confiscate or attach any property of complainant for the collection of said taxes; and furthermore, defendant denies that any injuries will be caused to complainant, or that it will be deprived of its property without due process of law. Defendant further denies that these taxes constitute a double taxation, or that the said law is contrary to the laws of the United States, or to the laws of Porto Rico, or that it constitutes an oppressive or inquisitorial confiscation of property; otherwise alleging that said law is not contrary to the laws of the United States or the Constitution;

(a) Because the United States Constitution is not in force in Porto Rico, *ex proprio vigore*;

(b) Because the United States Interstate Commerce Act is not applicable to Porto Rico;

(c) Because there is not prohibition in the Organic Act of Porto Rico, known as the Jones Act, forbidding the assessing and levying of a tax on the stock in trade in the hands of merchants used in their business, after the articles have become part of the mass of property of the taxpayer.

(d) Because the enforcement of the excise tax law of Porto Rico, as provided in the above said sections, is made according to the rules and regulations issued and prescribed by the Treasurer of Porto Rico; and according to the said rules and regulations, and the practice followed by defendant, the excise tax is not collected immediately after the sale of each article, but periodically, figured on the *ad valorem* price of the sale of the article during said specific time. And defendant furthermore denies that complainant has no remedy at law; otherwise alleging that it has an adequate, sufficient and complete remedy at law by payment under protest.

#### Special Defense

As a special defense, defendant alleges:

That the tax imposed by Act No. 68 of 1923, as amended by Act No. 1 of 1923 and Act No. 6 of 1924 is an excise

tax upon the sale of the article, and not a property tax or a tax on importation; that as an excise tax on sales, no collection can be made, or duty to pay arises, until the article is disposed of and has been transferred to another person, the property of same ceasing to be in the complainant; that the said excise tax, as imposed according to the above said law, is not an important tax, because it is not assessed until the article has left the hands of the carrier and until it has become part of the stock in trade of the merchant and is subject to commerce, and the same is not levied until the said article has been sold and the possession resides in the buyer, and the ownership of same has been transferred from the seller; that said tax is imposed, assessed and levied without distinction on articles produced or manufactured, or not manufactured or produced in the Island of Porto Rico, but sold herein; and that 48.5 per cent of the taxes received from said excise tax law are derived from articles produced or manufactured in Porto Rico; that said excise tax is never assessed, levied and collected until the articles subject to it has acquired a situs in the Island of Porto Rico, and is subject to its tax laws.

Defendant furthermore alleges that in all of these articles (automobiles) sold by complainant, the said complainant has collected from the buyer the amount of the tax that should be paid and is retaining the same, refusing to pay the said amount to the defendant or its agents; and defendant furthermore alleges that said taxes are really paid by the consumer or purchaser of the article, and not by complainant.

Defendant also alleges that the United States Constitution is not in force in Porto Rico *ex proprio vigore*; that complainant is not the really interested party in the suit; [fol. 32] and that no irreparable injury exists or has been caused to complainant in the enforcement of the Excise Tax Law of Porto Rico.

Wherefore, your defendant prays that the bill of injunction herein be dismissed, with costs, the court granting any other remedy that it may deem meet and proper.

San Juan, Porto Rico, June 9, 1925.

George C. Butte, Attorney General of Porto Rico.

Miguel A. Munoz, of Counsel. J. A. Lopez  
Acosta, of Counsel.

Copy received this — day of June, 1925, ———, Attorney for Complainant.

I, J. A. Lopez Acosta, hereby certify:

That I am one of the attorneys for the defendant, in the above entitled case; that a copy of this answer has been notified to attorney Cayetano Coll Cuchi, leaving a true and correct copy of same at his office at San Juan at 2.30 p. m. on this date, said Cayetano Coll Cuchi being absent from San Juan and the attorney in charge of his office having refused to sign the notification.

San Juan, Porto Rico, June 9, 1925.

J. A. Lopez Acosta, Attorney for Defendant.

Subscribed and sworn to before me by J. A. Lopez Acosta, on this ninth day of June of 1925. Antonio Aguayo, Clerk Dist. Court U. S. for P. R., by L. G. Donohue, Chief Deputy. (Seal.)

[fol. 33] IN UNITED STATES DISTRICT COURT

NOTICE OF FILING OF STATEMENT OF FACTS—Filed October 10, 1925

To the Attorney General of Porto Rico and to Honorable J. A. Lopez Acosta, Counsel for the Defendant, San Juan, P. R.:

Please take notice that the statement of facts in the above entitled case, copy of which is annexed hereto, will be filed today on the 10th of October, 1925.

San Juan, Porto Rico, October 10, 1925.

Cay. Coll Cuchi, Solicitor for Complainants.

Copy of the foregoing statement of facts duly acknowledged and the same being a true and correct statement of the evidence therein contained and presented in this case, the same is hereby approved.

San Juan, P. R., October 10, 1925.

George C. Butte, J. A. Lopez Acosta, Counsel for Defendant.

## IN UNITED STATES DISTRICT COURT

**Statement of Facts**—Filed October 10, 1925

Be it remembered that this case came on for hearing before the Honorable Ira K. Wells, Judge of the District Court of the United States for Porto Rico, sitting at San Juan, Porto Rico, on the fourteenth day of August, in the year one thousand nine hundred and twenty-five, plaintiff being represented by attorney Cayetano Coll Cuchi, Esquire, and the defendant, Juan G. Gallardo, Treasurer of Porto Rico, by the Attorney General of Porto Rico, by Assistant Attorney General J. A. Lopez Acosta.

Whereupon GEORGE A. STUCKERT, being then called as a witness for the plaintiff, being duly sworn, testified as follows: that his name is George A. Stuckert, residing at Puerta de Tierra, San Juan, Porto Rico; that his business [fol. 34] consists in buying and selling automobiles, accessories, supplies and parts; that they do business under the name of Smallwood Brothers; that what he means by automobile business is their principal business consisting in the Ford car, which they buy from the Ford Motor Company, together with parts, in Detroit and in New York; that the cars and parts of automobiles which they buy are from Detroit, State of Michigan, United States; that said cars and accessories come by railroad to New York and thence by steamship to Porto Rico; that they come under invoices and bills of lading, which invoices and bills of lading proceed from the Ford Motor Company to Smallwood Brothers; that the bills of lading are from the steamship company doing traffic from New York to Porto Rico; that they patronize all the big companies, the Baltimore Steamship Company, New York and Porto Rico Line, and Bull Line; that these wares are packed in a box when coming to Porto Rico; that after they are landed they stay there until taken away by Smallwood Brothers; that when the wares are taken away by the complainants, they carry them to their place of business situated at Stop 6, Puerta de Tierra.

Whereupon, the following proceedings took place:

Mr. Lopez Acosta: To gain time I would like that Mr. Coll refer to the kind of taxes. I refuse to have the record filled with immaterial matter. He must make examination on the basis of the matter in hand.

Mr. Coll: We will come to that.

The Court: It will be admitted and considered for what it is worth. Overruled.

Mr. Lopez Acosta: An exception.

And then the witness continued testifying that they are not always placed on sale right away, but some of the boxes are kept on hand to get them from the steamship docks, that is, they store them; that from the time they get that merchandise from Michigan until they are sold, they do not manufacture or do anything more to them before selling, except taking the box off; that he has been over his books lately, up to June 30th of this year; that the in-[fol. 35] vestment in their business, cash money, is approximately three hundred thousand dollars; that he means that the capital, actual cash to carry on the business, amounts to that sum; and that said sum is subject to the risk of business; that if they fail in their business they would lose more than three hundred thousand dollars; that to a great extent he is responsible for the bookkeeping of the firm; that without referring to the books he cannot state how much taxes were assessed by the Government of Porto Rico upon cars or accessories or parts of cars brought by the complainants from the United States during the period of time comprised from June 1, 1924, to June 1, 1925;

Whereupon, the following proceedings took place:

Q. 1. Please explain to the judge how they do it.

Mr. Lopez Acosta: I object to the use of that book unless it is offered in evidence.

The Court: He has a right to use it to refresh his memory.

Mr. Lopez Acosta: I would like to have the witness state so, because if your Honor should not admit it later on it has already been testified on.

Mr. Coll: I have to identify the book and then I will offer it in evidence.

The Court: I think it should be offered in evidence first, and the other side allowed to examine it. Objection sustained.

Mr. Lopez Acosta: We have no objection to admitting the book in evidence but wish to state that we reserve the right to contest the probatory force of this document until all the amendments, entries, etc., are proven to have been made correctly.

The Court: It may be admitted and considered for what it is worth.

Mr. Coll: I offer as part of my evidence a book marked in Spanish "Book of Stocks and Sales of Assessable Articles", as coming from the Treasury Department and with folios from 2801, it being written up to folio 2813, and from half of folio 2810 to folio 2813, written up only on one side of the page, the left side.

[fol. 36] Mr. Lopez Acosta: We object to the admission of this evidence in connection with the pages that do not cover the business of 1924 and 1925.

Mr. Coll: I cannot divide the document. I have to put it in in toto.

The Court: It will be admitted in evidence insofar as it relates to the time in question in this suit.

[Marked "Exhibit A for Complainant".]

Q. 2. Now, Mr. Stucker, please go ahead and explain to the judge how the officers of the Government use this book?

A. My statement is based on information received from my own employees.

Mr. Lopez Acosta: I object, your Honor, to anything that the witness knows from others.

The Court: Objection sustained. That is clearly hearsay.

Q. 3. Who writes in that book?

A. Several people write in it; our employee and the Government employee.

Q. 4. Who is your employee?

A. His name is James Waldron.

Q. 5. Under what supervision does he work?

A. As bookkeeper.

Q. 6. Who is the custodian of this document in your office?

A. He is.

Q. 7. Is he in Porto Rico?

A. He is.

Q. 8. Now let us come back to the question; besides this ten per cent (10%) tax, what other taxes do you pay?

A. We pay a municipal "patente".

Q. 9. I mean to the Insular Government.

A. An insular "patente" tax. It is in Spanish, but as I understand it it is for the privilege of doing business.

Q. 10. Have you got that here with you?

A. I have a receipt here.

Q. 11. Now, what is that that I hand you, if you know?

A. A receipt from April 1, 1925, to June 30, 1925, of one hundred twenty-five dollars (\$125), paid to the Department of Hacienda Insular Government.

[fol. 37] Q. 12. For what?

A. For doing business with motor vehicles, accessories, tires, and tubes.

Mr. Coll: I offer in evidence a receipt which is a document from the Government of Porto Rico paid by Smallwood Brothers for an occupation tax under the Excise Law for the quarter comprised between April 1, 1925, and June 30, 1925.

[Marked "Exhibit B for Plaintiff."]

Mr. Lopez Acosta: According to the laws of evidence I have the right to examine the witness first.

The Court: You may examine the witness as to this document.

Mr. Lopez Acosta: Mr. Stucker, is this a license for the sale of motor vehicles?

Mr. Coll: I object. That is a matter of law.

The Court: It shows for itself.

Mr. Lopez Acosta: Then I object to the admission of this document on the ground that it is immaterial, impertinent and irrelevant, and because the subject of the document is not in issue as to the tax on tires, accessories, nor casings and other parts.

The Court: This is an equitable proceeding in which there is no jury and the document will be admitted and considered for what it is worth.

Mr. Lopez Acosta: An exception, please.

And then the witness continued testifying that he has got some notes that would allow him to make the statement for the calendar year 1924; that what he has in his hands is a memorandum book made by himself from the general ledger and the books of the corporation that are under his control; that said memorandum was to refresh his memory in this case; that after refreshing his memory he can state that the taxes assessed for the year 1924 were thirty-eight thousand dollars, approximately; that the taxes assessed for the six or seven months of 1925 would be less than the total for the previous year; that the taxes assessed would be greater for the proportionate number of months, because their business and imports have increased; that they pay [fol. 38] great many taxes in their business; that it seems as if they were always paying taxes; that what he means by "excise taxes" is this eleven per cent tax of which they are speaking about; that the Government told the corporation to pay this eleven per cent tax; that this tax is levied on the landed cost of the goods; that the amount of thirty-eight thousand dollars and the other amounts to be paid to the Government this year are for the excise tax; that he means to say that that is the tax of ten per cent that they collect ad valorem on autos and parts; that last year the corporation was assessed in the neighborhood of thirty-eight thousand dollars, and that it will be about the same amount for this year.

[Witness picks up a book and says:] That this is the book in which the tax is assessed; that said book is furnished to them by the Treasurer of Porto Rico; that the said book is made by the Government of Porto Rico and given to Smallwood Brothers by the Government; that this book is for the purpose of assessing these excise taxes; that he is speaking about these ten per cent tax; that the name of the complainants' employee who writes upon this book is James Waldron, book keeper and custodian of this document in complainants' office; that besides this ten per

cent tax the complainants pay an insular "patente" tax which the witness understands to be for the privilege of doing business; that the paper shown to him is a receipt from April the first, 1925, to June 30, 1925, of one hundred twenty-five dollars paid to the Treasurer for doing business with motor vehicles, accessories, tires and tubes; that the complainants also pay an insular property tax on all of their movable property, including the automobiles on which they pay the ten per cent; that this is a percentage, a tax also of two per cent on the same automobiles on which the complainants pay a ten per cent excise tax; that the witness knows of his own knowledge that this tax of two per cent for which the witness is showing a receipt from the Government, is a percentage tax paid by the complainants on the same cars, trucks, automobiles, parts and accessories on [fol. 39] which the complainants pay the ten per cent excise tax; that the receipt is marked "27th day of January 1925", which is the day when it was paid, and that it is marked in a corner "1924 25".

Upon cross-examination by Mr. Lopez Acosta, the witness testifies that he is a member of Smallwood Brothers, acquainted with the business and transactions of this firm in the buying and selling of automobiles, but not with all details; that they buy their automobiles from New York, from the Ford Motor Company principally, to whom they send an order for an automobile, upon which said order the car is sent to the island; that when the car arrives the bank sends the complainants a draft which is then paid to the man who presents the draft; that after the automobile is paid for, they bring it up from the steamship pier and placed in their place of business; that they keep the automobiles in their place of business as their own property when they belong to them, or as somebody else's property when it has been so ordered.

Whereupon the following proceedings took place:

X Q. 13. Then tell us what automobiles that book shows you have received during the year from July 1, 1924, to June 30, 1925.

A. I am not familiar enough with the book.

X Q. 14. But you knew enough about the book to identify it for the complainant, did you not?

Mr. Coll: I object.

The Court: He——

Witness: Your Honor, the question in my mind is what these dates mean.

The Court: You are supposed to have put the dates there, or have charge of it.

Witness: Our bookkeeper put these dates in.

The Court: You have testified that it is more or less under your supervision and that it contains entries of all automobiles and accessories received by your company during the time mentioned, and you ought to know what the book contains.

[fol. 40] Mr. Coll: I think the witness is confused. We have in court the man who wrote the book.

The Court: He may answer the question if he can. Objection overruled.

And then the witness continued testifying that the tax is assessed on one side of the page of the book, and when a payment is made the entry is made on the other side of the page; that the witness never made any direct entries of any consequence in the book, relying on the bookkeeper to make all entries; that this book contains general information regarding the shipment of automobiles and the assessment of taxes; that the witness does not know what date the automobiles come into the possession of the complainants; that the witness does not know the amount of automobiles that the complainants had in stock in August, 1924, although he could give that information by looking up the complainants' books, which are not at hand; that the complainants pay freight for those cars to the same man who collects the price of the cars, because the freight is included in the amount of the draft; that the witness cannot say from memory how many of the automobiles brought by the complainants in the year 1924-1925 were the property of the complainants and what were brought upon somebody else's order; that the automobiles are sold in different ways; a few are sold for cash and the majority upon conditional sales contract whereby the title to the car remains with the firm of Smallwood Brothers until the last payment is made; that the man who buys the car has the possession of it; that the number of cars in stock by the com-

plainants varies every day, somewhere between thirty and one hundred cars, on the entire island, and that usually it is a fact that all cars in stock belong to the complainants; that the witness cannot say how much excise tax was paid in the month of July, 1924, but that he can say for the whole year the complainants paid thirty-eight thousand dollars, which knowledge he has from the memorandum made from the books; that he does not mean paid, but assessed; that during the calendar year 1924 the complainants paid fifteen thousand [fol. 41] and five hundred ninety-six dollars eighty-five cents; that the complainants paid a number of different taxes which are approximately two per cent property tax, as shown from the receipt in evidence, covering the merchandise in stock as of a certain date in January, which the witness thinks was the 15th of January; that according to the receipt the only property that was assessed at the date of the same, was the property that the complainants had in stock on the 15th of January, as upon inventory of that date.

Whereupon the following proceeding took place:

Q. 15. Now, Mr. Stucker, is it or is it not true that this license is the license to keep that store going? [Referring to the license introduced in evidence and marked "Exhibit R for Plaintiff."]

Mr. Coll: I object. That shows for itself.

The Court: Objection sustained. It shows for itself. His idea of what it is for might be right or wrong.

Mr. Coll: I am trying to show that a double tax is payable. If it is a double tax your Honor will decide.

The Court: I think the receipt will show for itself. The idea of this man or of the man who collects it might be absolutely wrong. The receipt must show what it is for.

Mr. Lopez Acosta: I take exception to the court's ruling on the ground that the court cannot decide when there is double taxation until it is proven that the taxes are similar, under the same law, and that those taxes are similar.

The Court: In answer to the objection the court would say that this witness can have no knowledge except to express his own conclusion as to what the tax is for. The receipt itself is the best evidence of the purpose of the tax.

X Q. 16. What is this tax for?

Mr. Coll: I object. That is the same question.

The Court: Objection sustained. Any evidence he could give would simply be his conclusion.

[fol. 42] X Q. 17. You have a store in Puerta de Tierra, have you not?

A. Yes, sir.

X Q. 18. What do you sell in that store?

A. Principally automobiles and parts.

X Q. 19. What else?

A. Tractors.

X Q. 20. What else?

A. Plows and implements, accessories, and tires, and labor. I think that covers everything.

X Q. 21. You sell oils do you not?

A. Yes; that is considered as an accessory.

X Q. 22. Do you sell gasoline there?

A. We do not sell gasoline at the curb retail. We do however put gasoline in repair jobs. In that way it may be said that we sell it.

X Q. 23. Do you sell cotton waste?

A. Yes.

X Q. 24. Do you pay any taxes for the right to sell these articles?

Mr. Coll: I object to that.

The Court: The witness may be asked what taxes he pays.

Mr. Coll: But not what he pays for, because he pays what the law says.

Mr. Lopez Acosta: It would be very nice if we could not ask the witness what taxes he pays and what he pays them for. We have the right to know if the amount of taxes that he refers to and all the licenses are taxes that he pays or does not pay.

Mr. Coll: The opinion of this witness does not bear upon this question at all.

Mr. Lopez Acosta: It bears upon the veracity of this witness.

The Court: I think he can ask the question, as touching upon his veracity.

Mr. Coll: Then I withdraw my objection if they are trying to contradict the witness. They may ask him questions in geography even.

A. We pay a number of different taxes, and we presume that we do pay a tax for the sale of those items, included in the many taxes that we do pay.

[fol. 43] X Q. 25. What are those taxes, Mr. Stucker?

A. May I refer to this book?

X Q. 26. Can you testify from memory?

A. Without referring to the books I can tell you some of them; yes.

X Q. 27. Then tell us some of them.

A. We pay approximately two per cent (2%) property tax. We pay insular taxes.

X Q. 28. What is that tax?

A. That is the tax the receipt for which is in your hands.

X Q. 29. Do you know of your own knowledge what this tax is?

A. No; I know it because I was told so.

X Q. 30. Mr. Stucker, you testified that you were assessed a tax of two point naught nine per cent (2.09%) for personal property, did you not?

A. I think I said we were assessed a property tax of approximately two percent (2%) covering merchandise in stock.

X Q. 31. About when was that tax assessed?

A. It was assessed as of a certain date in January.

X Q. 32. Do you remember the date?

A. I think it was the fifteenth of January. The receipts should show it.

X Q. 33. Are these the receipts you refer to?

A. Yes.

X Q. 34. Mr. Stucker, when this property tax was assessed on the 15th of January, 1925, did you have in stock at that time the cars you got from New York, or received from New York, in March, 1925, that is, after February, 1925, until July, 1925?

A. How could we have them in stock before they are received?

X Q. 35. Then, Mr. Stucker, how can you testify that this property tax refers to the same automobiles referred to in this complaint?

A. Because as I understand it this complaint covers a longer period of time than between February and July.

X Q. 36. Then did you have on the 15th of January, 1925, when this property tax was assessed, in your stock room, the same cars you received in 1924 from the States, or had you sold most of them?

A. We had sold most of them. To answer your question correctly I would have to check the identification of the car.

X Q. 37. Then according to this receipt the only property that was assessed was the property you had in stock on the [fol. 44] 15th of January, 1925?

Mr. Coll: I object to that your Honor because the question tends to confuse witness's mind. Witness stated that the cars were not the same cars he had four months before. He has not said he had the same amount of property.

The Court: The witness may answer if he knows upon what this assessment was made.

Mr. Lopez Acosta: This point is very important. The attorney for the plaintiff is trying to show double taxation.

The Court: Objection overruled.

A. The assessment was made on the inventory as of January 15th, 1925.

X Q. 38. When do you make the inventory?

A. Usually on January 1, 1925.

X Q. 39. Do you have in your inventory the cars you received in July of 1924?

A. Do you mean the same identical cars?

X Q. 40. Yes.

A. I cannot answer that. I don't know.

The Court: I suppose you could have the identical cars in stock that you received in July, that had not been sold in the meantime.

Witness: Correct; yes, sir.

Mr. Lopez Acosta: I move the court at this time to order stricken from the record the testimony of this witness in all that part of the testimony referring to the knowledge that the witness had from the books, because the books are the best evidence. Also that part of the testimony of the witness where he testified about knowledge received from other people, as in connection with the insular license for 1925, because the best evidence is the testimony of the persons themselves.

Mr. Coll: The motion is too late, your Honor. It cannot be made unless the objection was made at the proper time. In the second place the motion is not definite and specific enough to allow your Honor to make a ruling on it. You cannot rule to strike out parts of the record that are [fol. 45] not specifically described and indicated. The motion must be specific, stating what the testimony is, when it was given, etc. Otherwise I would not know what you would be striking out. In the third place the witness testified as to books under his control.

Mr. Lopez Acosta: The rule of law is this: You can make an objection when a question is made, or you can petition for a strike out when the answer is made, or you can make a motion for striking out at the end of the testimony. However, your Honor, I objected to the testimony, but I was prevented on the ground that the witness could not testify from those books. Therefore I am in time, and in law entitled to have this motion made at the end of the cross-examination of the witness.

The Court: The knowledge of this witness as to the books of this firm and their contents is very meagre and uncertain, and only such part of his evidence as refers to matters within his personal knowledge will be considered. This is a matter in equity, and the court will not consider the matters testified to by this witness of which he has not personal knowledge.

Then the witness JAMES A. WALDRON, being called and having been duly sworn, testified that his name is James A. Waldron, living in Puerta de Tierra, Porto Rico, a book-keeper employed by Smallwood Brothers; showing him complainants' Exhibit A, the witness testifies that it is a book given to Smallwood Brothers by the Government of Porto Rico to assess the taxes; that in the firm of Smallwood Brothers the witness is the one who keeps this book; that the object of this book is to place all taxes assessed on importations; that the witness means by that taxes assessed on automobiles, parts and accessories; that the book is in the witness' handwriting; that when he makes an entry in the books is under the supervision of the tax inspectors; that the tax inspector comes to the witness with a steamship manifest and makes the witness to get out his fac-

turas (bills of sales) and bills of lading; that the witness produces them and the inspector assesses the tax, the witness enters it in the books and the inspector initialed them; that the initials in the books are the initials of the agents [fol. 46] of the government; that the agents of the government give the witness from the manifest the data to be set down in the books; and that when they do that most of the times the merchandise is at the dock, on the pier; that it happens in many cases that the manifest comes ahead of the merchandise; and sometimes without the merchandise having arrived in Porto Rico; that after this process is completed, they proceed to collect the money for the tax; that looking at the book he may say that the last time that the agents of the People of Porto Rico assessed and collected the tax of ten percent in four items, the same amounted to one thousand five hundred seventy five dollars fourteen cents, as shown in page number 2810 and lines number seven to ten of the book; that the goods were one case electric horn buttons, twelve (12) cases automobile tires and steel rims, twenty one (21) cases auto cars and trucks, and sixteen (16) more cases of auto cars and trucks; that the book itself shows the condition of those merchandises so far as package is concerned when the taxes were assessed and collected; the said merchandises being in their cases, in the same cases in which they were when they came from the United States as shown in the said page 2810, and same column; that after the government assesses those taxes in the way that the book shows, with the merchandises within the package in the store room, in the pier or in transit, then the complainants make out a check for the amount and it is paid to the agents of the government after making an entry in the book shown to the witness (Exhibit D for the Complainants), and an amount of Internal Revenue stamps equal to the tax is cancelled; that to the knowledge of the witness the government agents assessed the ten percent tax actually upon the goods, cars or trucks in the stores of the complainants, but the taxes were always assessed upon the shipping manifest or the invoices, at a time when the merchandise might be at the dock or in transit.

Upon cross examination by Mr. Lopez Acosta, the witness testified that he had been in the employ of Smallwood Brothers for seven years; that the writing in the books used

[fol. 47] in evidence is his writing, and that the witness was in charge of the books, that the witness is sure that all the entries in the books are correct; that on page 2810, under the heading "Observations and Signature of the Internal Revenue Agents," the date of May 9, 1924, means the date that the government agents gave the witness as the date of the arrival of the steamship; that he places the date that the agents give him; but he does not know whether it is the date in which the merchandise arrives in Porto Rico; that he does not know whether on that date the boat came in or not, but that said date means when the merchandise arrives, according to the agents' statement; that he knows when the merchandise arrives in the warehouse of the complainants, but does not know when it arrives in Porto Rico.

Whereupon the following proceedings took place:

Mr. Lopez Acosta: I ask your Honor to strike out the testimony of this witness as he does not make that of his own knowledge.

Mr. Coll: He enters it in the way the government agent says, and that when the merchandise is assessed it is not in the possession of Smallwood Brothers. He has written that under the agent's directions.

Mr. Lopez Acosta: This man has testified that the tax is not collected when it is in the warehouse, but on the way. We are going to show that this tax is collected when the merchandise is in the possession of Smallwood Brothers.

The Court: He has testified that sometimes the tax is collected before the merchandise arrives, and sometimes when they have arrived. But he has never testified that he knows when they arrived. He testifies that the agent of the government would bring details to him and tell him that the steamship would arrive or had arrived on a certain date, and he would make the entry and they assessed the tax.

Mr. Lopez Acosta: I am going to show that that is not true.

The Court: Objection sustained.

[fol. 48] That the witness does not know if the goods taxed were on the ship which arrived on that date or not; that the date now showed to him is the 15th of July, on which date a government agent came to the witness and asked him to

produce the invoice in the steamship "Clare," voyage number eighty-two, bill of lading number ninety-eight; that date is that which the government agent gave the witness and it means the date when the government agent came and asked the invoices to be produced; that the witness was not able to say where was the merchandise when he made this entry; because he does not know; that sometimes the invoice comes in one boat and the merchandise in another boat, sometimes not for a month; that the date shown him is December 16th, and it means that an item was paid on that date, which the witness knows because he made out the check for the amount of six hundred dollars and thirty two cents, paid February 4th, 1925; that there is no place in the books to show when the goods were received, although it shows that the first entry is made on the 20th of August, and it was paid on the 4th of February.

Whereupon the following proceedings took place:

Mr. Coll: I object to this line of examination because the question is not when it was paid, but when it was assessed. What makes it illegal is the assessment and not the payment.

Mr. Lopez Acosta: Your Honor, it is the other way.

Mr. Coll: I would like to see the authorities.

Mr. Lopez Acosta: We are going to try to prove that the taxes were collected after the cars were sold, and in possession of the buyers.

Mr. Coll: It becomes illegal from the moment that the government makes the assessment.

The Court: I think the date of the assessment is the date to go by.

Mr. Lopez Acosta: The government can assess any number of taxes against any person and that person cannot do anything until we attempt to collect those taxes. We can assess millions of dollars on a taxpayer.

[fol. 49] The Court: You may show both dates.

Mr. Lopez Acosta: This is a sales tax.

Mr. Coll: That should be considered later.

The Court: The witness may answer.

X Q. 1. How long between the time of entering in the book and the time of payment?

A. It is right there in the book.

X Q. 2. Mr. Waldron, you testified that at the time these taxes were collected by the government, that the merchandise was at the dock, did you not?

Mr. Coll: He has testified that sometimes it is.

X Q. 3. Tell the court at what times, on what dates, the merchandise was on the dock and when it was not?

A. I would have to get the invoices.

X Q. 4. Did you know you were coming here today?

A. Yes, sir.

X Q. 5. Did you know what you would have to say?

Mr. Coll: He didn't know what he was going to be cross-examined about. He knew what I was going to bring out.

The Court: I think the question is perfectly proper and if you want the witness to get these invoices he will get them at the noon hour.

Mr. Lopez Acosta: I move the court to strike out this witness's testimony, as the best evidence is the books that he refers to.

The Court: His testimony will be considered for what it is worth; I think he has shown a very intimate knowledge of the book. His testimony will be considered for what it is worth.

W. P. SMALLWOOD, being then called as a witness for the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Coll:

Q. 1. State your name, please.

A. W. P. Smallwood.

Q. 2. You are one of the plaintiffs in this case, are you not?

A. I understand so; yes, sir.

Q. 3. Now, Mr. Smallwood, from the knowledge that you [fol. 50] have of your business, can you explain to the judge of this court, so that his Honor may appreciate the facts, how the ten per cent (10%) excise tax that you pay to the government or that the government assesses against your automobiles is arrived at by the government officers?

What is the process whereby they arrive at a given sum that you have to pay?

A. I understand they take the cost in the States, and they add the costs of landing it here in Porto Rico.

Q. 4. Now let's take an example. You mean the factory cost?

A. Yes, sir.

Q. 5. What is say one hundred dollars? Then they add what?

A. The cost of boxing.

Q. 6. Say ten dollars. Then what?

A. The cost from the factory to the seaboard.

Q. 7. Say five dollars. What else?

A. Then from the seaboard to the dock.

Q. 8. Say five dollars. Anything else?

A. And from the dock to our place of business.

Q. 9. Say another dollar. Do they add insurance?

A. Yes, sir.

Q. 10. And ocean transportation?

A. Yes, sir.

Q. 11. When they come to the total of these items, what do they do?

A. They take ten per cent of the total which represents profits.

Q. 12. They take ten per cent of supposed profits that you would make and they add that?

A. Yes, sir.

Q. 13. Then what do they do?

A. They take ten per cent as tax.

Q. 14. Then make you pay ten per cent on your profits?

A. Yes, sir; according to the figures.

Cross-examination by Mr. Lopez Acosta:

X Q. 15. Mr. Smallwood, where do you buy these cars?

Mr. Coll: I object to that, as that is not in the line of my direct testimony.

Mr. Lopez Acosta: I withdraw the question.

[fol. 51] X Q. 16. What is your profit in the sale of the car, considering the price of the automobile and all expenses until you have it in Porto Rico?

A. You say, how much is the profit?

Q. 17. Yes, sir.

A. I don't think anybody can answer that question.

X Q. 18. How much do you pay for the car in the States?

A. I would have to know what car you mean.

X Q. 19. The Ford car.

A. It depends on what kind of wheels, class of car, etc.

Mr. Coll: This is not material, your Honor. The proper way is to establish a hypothetical figure of how much the car costs, how much are the expenses and how much would be the ten percent profits. But the government has no right to ask this question.

The Court: The plaintiff in this suit commenced the suit, and the witness is a witness in his own behalf. The witness has a right to answer this question. Proceed.

X Q. 20. Mr. Smallwood, how much do you make, what is the profit in the sale of an ordinary, common Ford car, without extra wheel, without extra top, without any extras?

A. If I made the statement I would be guessing.

X Q. 21. Well, guess.

A. I really don't know.

X Q. 22. How long have you been in the business? Are you not a member of this firm?

A. I don't know anything about the details.

X Q. 23. You stated the amounts, did you not?

A. That was hypothetically speaking.

Mr. Lopez Acosta: Then I move, your Honor, to have the testimony of this witness stricken out as it was only hypothetical, and it is wholly irrelevant, immaterial and not pertinent in this case.

Mr. Coll: If it please the court, the testimony brought out was very material and relevant, since its purpose was to bring out, as it did, quite clearly, though hypothetically, the method employed by the government in assessing the ten percent tax on automobiles, trucks, accessories, etc., [fol. 52] showing how a fictitious profit of ten percent was added to the other items of cost, before assessing the excise tax of ten percent. As to the profit which might be made on a car, who can make such a statement. The profits are calculated on the total volume of business at the end of the year. It is impossible to say what is the profit

on any car. He does not know. He is in business to make a profit, but he might take a loss on one transaction and a profit on another, and one must be taken with the other in order to arrive at an average. Anyone who understands something of bookkeeping will know how this is. Furthermore, I must point out that my line of questioning is absolutely away from the cross-examination that counsel is now following.

Mr. Lopez Acosta: As far as knowledge of bookkeeping is concerned, I would like to say that I was a bookkeeper before I was a lawyer. I will show to your Honor that the other side does not know what profit was made. If they do not prove that there was a profit, how can they allege that this tax was assessed on the profit?

The Court: I understand from their testimony that they claim in fixing the amount of the taxes that you add ten percent and tax them on that.

Mr. Coll: And that is the law, your Honor.

Mr. Lopez Acosta: Therefore, it is immaterial, and I move to have it stricken out.

The Court: It will be considered for what it is worth.

Mr. Lopez Acosta: I would like to file a motion to dismiss on these grounds.

Mr. Coll: You cannot do that unless you waive your evidence. That means a general demurrer to the evidence, and you cannot do that unless you waive your right to the evidence.

The Court: We will take that up at two o'clock this afternoon. Court will be at recess until then.

[The court then took a recess until 2.00 P. M.]

Mr. Lopez Acosta: This motion, if your Honor please, is for want of jurisdiction. Now comes the defendant at the [fol. 53] close of the plaintiff's case and respectfully moves the court to dismiss the petition of injunction herein filed because from the evidence offered and admitted it does not appear affirmatively and distinctly that the amount of taxes, the object of the injunction and involved in this suit, reaches the amount of three thousand dollars (\$3,000) exclusive of interest and costs.

In the first place I wish to argue my right to file this motion. The Judicial Code that regulates practice in the

Federal Courts, in speaking of the time to ask for a dismissal for want of jurisdiction, in section 37, 36 Statutes at Large 81087, and in section 5, 18 Statutes at Large 472, reads as follows:

"Sec. 37. If in any suit commenced in the district court, or removed from a State court to a district court, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

And Foster on Federal Practice commenting on this section of the Judicial Code, vol. 2, page 1917, says:

"Dismissal for Want of Jurisdiction.—The Judicial Code provides: 'If, in any suit commenced in a District Court or removed from a State court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really or substantially involve a dispute or controversy [fol. 54] properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as Justice may require, and shall make such order as to costs as shall be just.' The court should do this of its own motion, as soon as it discovers its want of jurisdiction or the improper or collusive joinder. The Supreme Court has said that such an act is salutary, and that it is the duty of the courts to exercise their power under it in all proper cases. Neither party has the right, however, without plead-

ing a denial within the time allowed for that purpose, to introduce evidence to contradict averments of the jurisdictional facts; but if the defect appears upon the plaintiff's pleading or the evidence, the objection may be taken at any time even after a trial upon the merits."

Now, if your Honor please, if at the close of the plaintiff's case it does not appear from the evidence that the amount involved in this suit is the amount of three thousand dollars, exclusive of interest and costs, this court has no jurisdiction, and now is the proper time for the defendant to move the court to dismiss the bill; and even if I do not do it, your Honor has, imposed by the law, the power to dismiss the bill. If your Honor please, it is a well known fact that the Federal Court is a court of limited jurisdiction. No cases can come into this court except when there is a case of citizenship, or if the amount in consideration is three thousand dollars (\$3,000) or more. I would like to cite to your Honor the case of *Norton v. Larnea*, decided January 5th, 1925, a very recent case. The opinion delivered by Justice Sutherland appears in advance sheet of United States Supreme Court opinions numbers six (6) and seven (7), page 187, where it says:

[fol. 55] "It is quite true that the jurisdiction of a Federal Court must affirmatively and distinctly appear, and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings. If it does not thus appear by the allegations of the bill of complaint, the trial court, upon having its attention called to the defect, or upon discovering it, must dismiss the case, unless the jurisdictional facts be supplied by amendment."

In the case of the First National Bank of Columbus, Ohio, versus the Louisiana Highway Commission et al., decided March 17th, 1924, advance sheets of the United States Supreme Court Opinions, volume twelve (12), page 381, it was decided by Judge Butler that: "It must appear on the face of the complaint, or otherwise from the proofs, that the matter in controversy exceeds, exclusive of interests and costs or value of three thousand dollars." And, if your Honor please, in the case of *Sovereign Camp, Woodmen of the World*, versus *O'Neill*, decided November 17,

1924, United States Supreme Court Opinions, volumes three (3) and four (4), page 52, where the different claims in taxes were accumulated to give the court jurisdiction, Judge Sanford gives this opinion: "It is the settled general rule, frequently applied by this court in tax cases, that in a suit based upon diversity of citizenship brought against defendants to enjoin against the collection of claims against the plaintiff which are separate and distinct—although depending for their validity upon a common origin—the test of jurisdiction is the amount of each separate claim, and not their aggregate amount."

If your Honor please, if you look into the record in this case you will find there were only three (3) witnesses on the stand. Mr. Waldron only testified as to a book. Your Honor will be able to give that testimony probatory force, but no attempt was made to prove the jurisdictional amount by this witness. The only witness was Mr. Smallwood and he was only used to prove the method of imposing the tax. [fol. 56] The only evidence, if your Honor please, is the declaration of Mr. Stucker. It is alleged in the complaint that jurisdictional amount in this case amounts to more than three thousand dollars. We have denied the fact. Therefore, it remains for them to prove it. Mr. Stucker testified that his knowledge and information was from the books. We asked that this testimony be stricken out as the books were the best evidence, and according to the rules of practice no secondary evidence is permitted unless it is proven that the first evidence is out of the court's jurisdiction, or cannot be obtained, and nothing of this has been proved in this case. The only testimony given by Mr. Stucker was that during the year they were assessed thirty-eight thousand dollars. According to the statement of the witness this testimony was based on the books. Therefore, if the court is going to grant our motion to strike out the testimony, it must go out of the record. But suppose, if your Honor please, that this must stand on the record, is it sufficient to show that the taxes to which this complainant refers amount to more than three thousand dollars? The plaintiff cannot go into court to prove any claims for taxes beyond what is included in the complaint.

The amount of the taxes that the government tried to collect, and for which the injunction was issued, have not

been proved and there is no evidence sufficient in this case to show that the amount in controversy exceeds three thousand dollars so that this court may have jurisdiction.

Mr. Coll: I am bound to say that the government is taking a very risky step. They have modified their attitude a little bit from this morning. This morning they moved to dismiss on the ground that our evidence did not sustain our ground in this case. Now they want to move that the case be dismissed on the ground that we have not proved the jurisdictional amount. This is very important to bear in mind, unless at the same time they waive their right to introduce any more evidence. I am not going to bother your Honor to read the decisions, but I am going to read [fol. 57] the digest of the decisions as contained in the Encyclopedia.

Your Honor will find in 21 Corpus Juris the following paragraph under the title of Equity: "Dismissing a bill at the close of plaintiff's case, before defendant presents or rests his case, is not correct practice in equity, in the absence of express provisions to the contrary. The case being set down for hearing on the bill, answer and proof, if defendant is willing to risk his case upon plaintiff's proof or rather the failure of plaintiff to prove his case, he should submit the case to the court for final hearing, and if he is not so satisfied, he should present what proof he desires or may be able to present."

There are three notes in that paragraph and citations of cases, and when your Honor looks at them your Honor will find that he is admitting the final disposition of the case without possibility of reopening the case and getting the defendants here. Why that is very simple. If your Honor will look at Equity Rulings, you will find that Judge Dillon decided that squarely, and no attempt has been made to upset Judge Dillon's decision.

We argued it before the previous incumbent in this court and he decided it did, and the bill of complaint definitely and formally alleged that the amount involved exceeded the sum of twenty thousand dollars. If we have not won that point the government has won the case, and they should be in a position to go into the final hearing. I do not like to take advantage of these technicalities, and I tell your

Honor that it seems impossible that counsel for the government might for a single moment pretend to impose upon your Honor a motion of this kind when we have here this book. I don't care anything about Mr. Stucker, or Mr. Waldron, or Mr. Smallwood. We have here the government book——

The Court: I do not care to hear from you there on that at this time, Mr. Coll. I will decide the whole case at once. Thus the motion will be overruled.

Mr. Lopez Acosta: An exception.

Mr. Coll: I have no more witnesses, your Honor.

[fol. 58] [Plaintiff rests.]

Mr. Lopez Acosta: We offer in evidence the testimony of Mr. Amy as to how these taxes are assessed.

Upon cross examination the witness testifies that he cannot say how much profit the complainants make upon the sale of a single car.

And then the complainants rested their case.

Cay. Coll Cuchi, Attorney for Complainants.

## IN UNITED STATES DISTRICT COURT

### JUDGE'S CERTIFICATE TO STATEMENT OF FACTS

The complainant appellants, T. H. Smallwood et als., tender and present the foregoing as its statement of evidence in this case and prays that the same be approved by the court and made a part of the record and the same is accordingly done this tenth day of October, 1925.

The foregoing contains all the evidence, excepting exhibits, in the case in narrative form, and where the testimony herein is set forth in the form of question and answer, it is so set forth that the evidence might be clearly understood.

San Juan, Porto Rico, October 10, 1925.

Ira K. Wells, District Judge.

## IN UNITED STATES DISTRICT COURT

OPINION AND JUDGMENT—September 18, 1925

Honorable Cay, Coll y Cuchi, Attorney for Complainants.  
The Attorney General, Attorney for the Defendants.

WELLS, J.:

In this case the facts are substantially the same as in equity case No. 1286 of Insular Motor Corporation, Complainant, v. Juan G. Gallardo, Treasurer of Porto Rico, Defendant. This case was submitted at the same time as the Insular Motor Corporation case and the law involved is the same and was argued and presented in the same briefs. [fol. 59] The decision in this case will follow that of the Insular Motor Corporation above referred to for the reasons therein stated.

The temporary injunction hereinbefore issued is therefore dissolved and the complaint dismissed with costs.

Dated at San Juan, Porto Rico, this eighteenth day of September, 1925.

Ira K. Wells, Judge.

## IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND FOR A SUPERSEDEAS—Filed September 22, 1925

To the Hon. Ira K. Wells, Judge of the District Court of the United States for the District of Porto Rico:

The petition of the complainants respectfully represents:

That petitioners are aggrieved by the judgment and decree herein rendered on September 18, 1925, in favor of the defendant and against the said complainants, ordering the dissolution of a preliminary injunction in this case, and that petitioners, for the reasons specified in the assignment of errors filed herewith, desire to appeal and do hereby appeal from said decree, and desire that said appeal, returnable to the Circuit Court of Appeals for the First Circuit, shall operate as a supersedeas and may suspend during

the pendency of said appeal the effect of said order and decree of dissolution.

Wherefore, the petitioners pray that the said appeal may be allowed, and that, upon their giving bond in an amount to be fixed by this court, the said appeal may operate as a supersedeas and may suspend during the pendency of said appeal the effect of said decree of dissolution; that said appeal be made returnable to the United Circuit Court of Appeals for the First Circuit, according to law, and that a transcript of the record, proceedings and papers and exhibits upon which said decree was rendered, duly authenticated, be sent to the said Circuit Court of Appeals.

And petitioners pray for all general and equitable relief.  
[fol. 60] San Juan, Porto Rico, September 21, 1925.

Cay. Coll Cuchi, Solicitor for Complainants.

#### IN UNITED STATES DISTRICT COURT

##### ASSIGNMENTS OF ERROR—Filed September 22, 1925

Now, on the twenty-first day of September, 1925, came the said complainants, by Cay. Coll Cuchi, their solicitor, and says that the decree in said cause is erroneous and against the just rights of the said complainants, for the following reasons:

1. Because the evidence in the case showed that the taxes in question were taxes upon importations into Porto Rico from the United States.

2. Because the evidence showed that the taxes in question were imposed upon goods and merchandises in the course of interstate commerce.

3. Because the evidence showed that the taxes in question were imposed upon property before the said property reached into the hands and possession of the complainants.

4. Because the Act No. 68 of the Legislature of Porto Rico of 1923, as amended by Act No. 1, of August 27, 1923, and by Act No. 6, of June 23, 1924, is null and void because it constitutes double taxation inasmuch as in accordance with the General Tax Law or Political Code of Porto Rico

the said property at the same time and under the same conditions, has been taxed with a previous tax ad valorem, and with a previous tax upon the occupation or business of the complainants.

5. Because the said laws are in open violation and contradiction of the laws of the Congress of the United States, that provide that in no event shall any duties of the kind complained of in the bill of complaint herein, be imposed upon articles brought from the United States into Porto Rico.

6. Because the proceedings to make said tax effective are [fols. 61 & 62] in the nature of a confiscation of the property of these complainants, without due process of law.

San Juan, Porto Rico, September 21, 1925.

Cay Coll Cuchi, Solicitor for Complainants.

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IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND SUPERSEDEAS—September 24,  
1925

Considering the foregoing petition this day presented it is ordered that an appeal be allowed to the petitioners and complainants in this suit, from the decree of September 18, 1925, rendered against said complainant in the above entitled and numbered cause, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the First Circuit, and that, upon the execution of a bond in the penalty of twenty-five thousand dollars said appeal shall operate as a supersedeas of said decree and shall suspend, until the final decree or appeal herein, the effect of the order dissolving the preliminary injunction herein, and that a transcript of the record, including all the exhibits offered in evidence by either party, be filed in the United States Circuit Court of Appeals, according to law, as prayed for.

San Juan, Porto Rico, September 24, 1925.

Ira K. Wells, District Judge.

Bond on Appeal for \$25,000 approved and filed September 24, 1925, omitted in printing.

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[fol. 63] Citation, in usual form, showing service on Juan G. Gallardo, omitted in printing.

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[fol. 64] IN UNITED STATES DISTRICT COURT

PRECIPE FOR TRANSCRIPT OF RECORD—Filed September 30, 1925

To the Clerk:

You are requested to take a transcript of the record to be filed in the United States Circuit Court of Appeals for the First Circuit, pursuant to an appeal allowed in the above entitled case and to include in said transcript of record the following and no other papers or exhibits, to wit:

[fols. 65 & 66] The Amended Bill of Complaint.

The Motion to Dismiss.

The Order and Opinion Denying Motion to Dismiss.

The Preliminary Injunction.

The Bond on Preliminary Injunction.

The Answer.

The Statement of the Case.

The Petition for Appeal and Supersedeas.

The Findings, Opinion and Decree.

The Order Allowing Appeal and Supersedeas.

The Citation.

The Bond on Appeal.

The Assignment of Errors.

The Precipe.

Respectfully, Cay, Coll Cuchi, Attorney for Com-  
plainants-Appellants.

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Clerk's certificate to foregoing transcript omitted in printing.

[fol. 67] IN UNITED STATES DISTRICT COURT

SUPPLEMENTARY PRÆCIPUE FOR TRANSCRIPT OF RECORD—Filed  
March 31, 1926

To Antonio Aguayo, Esq., Clerk of the District Court of  
the United States for Porto Rico:

Please include in the transcript of the record in this case and send to the Circuit Court of Appeals for the First Circuit, in addition to the papers, pleadings and proceedings already sent in the præcipe of this case, the following:

Final decree nunc pro tunc, entered by the court on  
March 31, 1926.

San Juan, Porto Rico, March 31, 1926.

Coll Y Cuchi & Cruzado Silva, por G. Cruzado Silva.

Copy of the above supplementary præcipe is hereby acknowledged this 31st of March of 1926.

George C. Butte, Solicitor for Defendant.

Attest: A true copy. Antonio Aguayo, Clerk, by Mary  
Aguayo, Deputy. (Seal.)

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IN UNITED STATES DISTRICT COURT

FINAL DECREE NUNC PRO TUNC—Filed March 31, 1926,  
Nunc pro Tunc as of September 18, 1925

On this the thirty-first day of March, A. D. 1926, came the parties to this cause, by their attorneys, and made known to the court that no final decree has been entered in this cause, and that the said cause is now on appeal before the United States Circuit Court of Appeals for the First Circuit. It appearing proper, therefore, that a final decree nunc pro tunc should be entered in this cause as of the eighteenth day of September, 1925, and all parties agreeing to this, it is hereby ordered that the following Final Decree be entered:

[fol. 68] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
PORTO RICO

Equity. No. 1285.

T. H. SMALLWOOD, W. F. SMALLWOOD, A. D. SMALLWOOD, E.  
A. Smallwood, G. C. Smallwood, George A. Stuckert,  
Doing Business under the Firm Name of Smallwood  
Brothers, Complainants,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico, Defendant

Bill to Recover an Illegal Tax and for an Injunction

FINAL DECREE—Filed March 31, 1926, nunc pro tunc as of  
September 18, 1925

This cause came on for final hearing on the fourteenth day of August, A. D. 1925, all parties appearing by counsel, and the evidence being closed, the case was thereupon submitted to the court upon written briefs filed by the parties.

And having considered the evidence, the pleadings and the briefs of counsel, the court finds that the equities in this cause are with the defendant, Juan G. Gallardo, Treasurer of Porto Rico, and that the taxes as demanded of complainants by defendant, and which are complained of in the bill of complaint herein, are valid and legal in every respect.

It is therefore ordered, adjudged and decreed that the temporary injunction hereinbefore issued in this case be hereby dissolved, and that the petition for injunction to restrain the defendant, Juan G. Gallardo, Treasurer of Porto Rico, from assessing and collecting from complainants the taxes provided under Act No. 68 of the second session of the tenth Legislature of Porto Rico, approved July 28, 1923, as amended by Act No. 1, approved August 27, 1923, and Act No. 6, approved June 23, 1924, be and the same is hereby denied, and that the bill of complaint be herewith dismissed.

It is further ordered, adjudged and decreed that the complainants pay all costs herein.

Let this decree be entered nunc pro tunc as of the eighteenth day of September, A. D. 1925.

[fols. 69 & 70] Dated at San Juan, Porto Rico, this thirty-first day of March, A. D. 1926.

Ira K. Wells, Judge.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 71] IN UNITED STATES DISTRICT COURT, DISTRICT OF  
PORTO RICO

No. 1302. Equity.

ADOLFO VALDES ORDOÑEZ, SALVADOR GARCIA, VICTOR OCHOA,  
Pio Perez, Luis E. Cuyar, Sucesion De Jose Ochoa and  
Carmen Albornoz De Ochoa, Doing Business under the  
Firm Name of J. Ochoa & Hno., Complainants,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico, Defendant

Bill for an Injunction

BILL OF COMPLAINT—Filed August 13, 1925

To the Honorable Ira K. Wells, Judge of the District Court  
of the United States for Porto Rico:

Now come the complainants above named, by the undersigned solicitor, and respectfully show:

[fol. 72] 1. That the complainants are all of age and residents of the Island of Porto Rico.

The defendant, Juan G. Gallardo, is an American citizen and the Treasurer of Porto Rico, with residence within this district, duly appointed and qualified, and acting as such Treasurer during all times referred to in this bill of complaint.

2. The complainants do business in Porto Rico under the firm name of J. Ochoa Hermano; and their main and principal business consists in the sale of automobiles and automobile accessories; and each and all of the goods and merchandises sold by the complainants in their regular course of business are manufactured, produced and built in the

United States, principally in the States of Michigan and Connecticut, and brought into Porto Rico under regular invoices and bills of lading showing the state from which they are thus brought within this jurisdiction; said goods, wares and merchandises being sold by the complainants to the public at large in exactly the same conditions in which they are brought into Porto Rico without any process of further manufacture, or improvement or betterment than that of their original condition.

And complainants allege that they are engaged in the importation of auto cars from the United States to be sold in Porto Rico; that the complainants have invested in said business more than one hundred thousand dollars and the continuation and development of said business is based entirely upon the importation of motor cars from the United States as aforesaid; that the complainants have imported during the past twelve months motor cars on which taxes hereinafter mentioned would exceed the sum of twenty thousand dollars; all of which is levied against importations upon goods manufactured in the United States and imported therefrom; that complainants are and will continue to import said goods during this year upon which, unless the relief herein invoked is granted, it will be compelled to pay the said taxes to an amount of not less than twenty five thousand dollars; that the value of motor cars made in the United States to be imported by the complainants this year will amount to not less than two hundred thousand dollars.

3. That the Legislative Assembly of Porto Rico passed an Act, which was duly approved by the Governor, on the twenty-eighth day of July, 1923, entitled "An Act to provide revenues for the People of Porto Rico by levying certain excise and license taxes for the practice of certain professions, industries or business; to regulate the manufacture, use and sale of alcoholic preparations and other articles; to impose certain penalties; to repeal the excise and license tax laws now in force, and for other purposes; which act was subsequently amended by an Act of August 27, 1923, and by another Act of June 23, 1924"; said acts being commonly known as the Excise Tax Law of Porto Rico; and that by virtue of Tax Law an Excise Tax upon

the goods, wares and merchandises, sold by the complainants, which complainants allege is an illegal, oppressive and wrongful tax, for the reasons to be hereinafter alleged, is provided for as follows:

"Section 20. That there shall be levied, collected and paid, for one time only, as an internal revenue tax on each of the following articles: \* \* \*

18. Motor vehicles.—On every motor vehicle, automobile, motor-cycle, aeroplane, hydroplane, dirigible, side-car for motorcycles, motor for automobiles, bicycle, launch, auto-truck, chassis, auto-wagon, auto-tractor, parts and accessories for all of the aforesaid articles, solid or pneumatic tires, inner tubes therefor, excluding tools, screws, tube-valves, spark plugs and light bulbs, piston rings, felt washers, steel ball-bearings, lamp lenses, radiator rubber tube-clamps therefor, vibrators and tire tube patches, produced, manufactured, sold or used in Porto Rico, a tax of ten (10) per cent ad valorem.

Persons, not residents of Porto Rico, using their own automobiles for personal use only, shall be exempt from payment of tax for a period not to exceed sixty days from the date when they began to use said automobile. On the [fol. 74] expiration of that period, or before, if the automobile is destined for other purposes than the above mentioned, the tax shall be paid."

4. Complainants respectfully allege that in said law the following sections have determined the procedure to make such illegal and unlawful tax effective, and prescribing penalties for the refusal to pay said tax:

"Section 33. The Tax hereby prescribed on articles for sale, use, consumption or exhibition in Porto Rico, except as provided in Section 29 of this Act, shall be levied as soon as they are on the market in possession of a dealer or commission merchant or the representative thereof in this island, who shall be responsible for the payment of said taxes upon transferring said articles to another dealer or consumer, or upon acquiring them or having them in his possession, and who shall pay such taxes in one of the two following forms in accordance with such regulations as the Treasurer of Porto Rico may prescribe for the purpose:

(a) Upon acquiring the taxable articles and having them in his possession, by making entries of receipt and delivery in the stock and receipt and delivery book, and by simultaneously paying the tax by cancelling the corresponding stamps on an internal revenue invoice; (b) or as he disposes of the taxable articles. Persons acquiring taxable articles through channels other than the aforesaid dealers or commission merchants or their representatives, shall pay said taxes as soon as they obtain possession of the articles and in accordance with the definition of ad valorem contained in this Act.

"Dealers shall be responsible for the payment of said tax when he acquires taxable articles, if such tax shall not have been paid.

"Section 34. All persons dealing in taxable merchandise, or who have or shall have had such merchandise in store, shall furnish the Treasurer of Porto Rico or his duly authorized representatives, all such information as may be required of them in connection with said merchandise.

"Section 35. From and after the date on which this Act takes effect, every person acquiring any taxable articles for his personal use or consumption, on which the tax specified in this Act has not yet been paid, shall, as soon as coming into possession thereof, file an affidavit, with the Treasurer of Porto Rico, stating the class and quantity of the articles acquired, their value, and any other information that the Treasurer of Porto Rico may by regulations prescribe.

"From and after the date on which this Act takes effect, every person, who by himself or through his agents or representatives, acquires taxable articles for sale or transfer to another merchant or consumer, and on which the taxes specified by this Act have not been paid, shall keep in his commercial establishment, from which it shall not be removed, except by authorization of the Treasurer of Porto Rico, an official book wherein entries shall be made of all taxable articles at the time they are acquired, and the corresponding entry at time of selling or otherwise disposing of them, and further, furnish all other information that the Treasurer of Porto Rico may by regulation

prescribe for the purpose of determining the value and other circumstances in connection with such articles; provided, That upon the taking effect of this Act, the stock on the market shall be classified as follows:

"(a) That on which the tax has already been paid;

"(b) That subject to the payment of taxes on which such taxes have not been paid;

"(c) That which was not subject to the payment of taxes prior to the date on which this Act takes effect; Provided further, that merchandise already acquired under classes (a), (b) and (c), shall not be taxable under this Act, provided, further, that the Treasurer of Porto Rico is hereby empowered to adopt such necessary measures not in conflict herewith, as shall prevent any person from fraudulently evading or attempting to evade, the payment of taxes herein provided for, making merchandise acquired during the time this Act is in effect, appear as if acquired prior to the date on which it takes effect; And, provided, further, that every person who, availing himself of such means shall evade or attempt to evade payment of said taxes, shall be deemed guilty of misdemeanor, and when the court in whose jurisdiction the offense has been committed convicts such persons, he shall be fined in a sum of not less than one hundred (100) dollars, or shall be sentenced to prison for a term of not less than thirty (30) days.

"Section 36. That articles subject to tax, used by agents or commission merchants as samples for the purpose of soliciting business, shall be exempt from the payment of the said tax upon furnishing a bond in such amount and in such form and condition as the Treasurer of Porto Rico may demand, and if for any reason the said articles shall be disposed of for consumption or use in Porto Rico, the excise tax, as prescribed in this Act, shall be paid thereon.

"Section 37. That all taxes provided for in this Act shall be paid by affixing and cancelling internal revenue stamps on such documents and articles, as for such purpose the Treasurer of Porto Rico may prescribe. Such stamps shall be furnished by the Treasurer of Porto Rico, on requisition,

to collectors of internal revenue, in such quantities as may be necessary for local needs; Provided, that for the purpose of identification of certain taxable articles such as perfumery, medicines, arms and others which, in the judgment of the Treasurer of Porto Rico, it may be necessary to identify so as to determine whether or not the taxes required by this Act have been paid, the Treasurer of Porto Rico is hereby authorized, through the promulgation of rules and regulations, to cause to be affixed to the said [fol. 77] articles stamps or other adequate signs which shall be furnished gratis to taxpayers by the Treasurer of Porto Rico; provided, further, that the Treasurer of Porto Rico may affix such stamps on taxable articles required while former excise tax laws have been in force and which articles are in the market when this act takes effect.

"The lack of such stamps or signs on the articles required by regulations, shall constitute prima facie evidence that the tax has not been paid.

"Section 38. That every person who fails to pay the taxes herein prescribed, at such time and in such manner as this Act provides, except as otherwise herein determined, shall be guilty of misdemeanor, and the merchandise on which said tax has not been paid may be attached by the Treasurer of Porto Rico or by his agents and by him sold at public auction to indemnify the People of Porto Rico for the sums defrauded by the violator.

"Section 39. That every person who shall have in his possession or has on any premises under his control, any merchandise subject to tax under the provision of this Act, on which such tax has not been paid, except such as are duly entered in the official book of a licensed manufacturer, or of a dealer, shall be guilty of misdemeanor, and the merchandise may be seized by the Treasurer of Porto Rico or by his agents, and by him sold at public auction to indemnify the People of Porto Rico for the amounts defrauded by the violator, and the license of such person, if a merchant, may be revoked."

5. That the Legislative Assembly of Porto Rico passed a law, duly approved by the Governor, on the 23rd of June, 1924, entitled "An Act providing for the payment of taxes under protest, etc.", as follows:

"Section 1. Whenever a taxpayer believes that he should not pay a tax or part thereof because he understands that [fol. 78] it is illegal, excessive or wrongfull, he shall, however, have the obligation to pay the same in full upon request of the collector of taxes of his district, or of the official in charge of the collection of taxes, and shall ask the said collector or the said official in charge of the collection of taxes, should he desire to make any claim, to endorse the tax receipt specifically stating whether the said protest refers to the whole or to a part of that tax paid under protest, and setting forth the exact amount protested. The said endorsement shall be signed by the taxpayer and by the collector or officer in charge of the collection of taxes.

"Section 2. After payment is made, the collector of taxes or the official in charge of the collection of taxes, shall cover the sum collected into the Treasury of Porto Rico, reporting to the Treasurer the total amount of the tax, as well as the part thereof paid under protest.

"Section 3. The moment that a tax paid under protest is received, the part thereof not protested, if there be any, shall be considered as all other receipts from taxes, the amount of which is to be applied to the obligations of the Insular Government, and in the case of property taxes the part of said tax pertaining to the respective municipalities pursuant to law, shall be paid over to them. The protested part shall be covered into a special fund to be known as 'Taxes paid under protest—Trust Fund.'

"Section 4. A taxpayer who shall have paid under protest the whole or part of any tax shall, within a term of not to exceed thirty days from and after the date of payment, sue the Treasurer of Porto Rico in a court of competent jurisdiction to secure the return of the amount protested. The Treasurer of Porto Rico, through the Attorney General or through the official designated by the latter from his department, shall answer the said suit within the term granted by law for the filing of answers and shall [fol. 79] make therein, in their order, allegations to strike out particulars of the complaint and demurrers.

"When the case is ready for trial the court before which the action is pending shall fix the day for the trial thereof without the necessity of a request from the parties, first serving due notice on them.

"When final decision is rendered, if favorable to the taxpayer, the Treasurer of Porto Rico shall proceed to return to him the amount directed in the decision to be charged against the fund 'Taxes paid under protest—Trust Fund,' referred to in section 3 hereof.

"If the decision be favorable to the People of Porto Rico, the Treasurer shall cover from the fund known as 'Taxes paid under protest—Trust Fund,' into the proper fund such amount of the tax as directed by the court in its decision, turning over to the respective municipalities the proportion established by law in cases of property taxes.

"Section 5. Either party may appeal to a higher court by filing in the court a quo his appeal within ten days after the decision is rendered, as provided by section 4 of this act; provided, that if the taxpayer be the appellant he shall file, together with the petition for appeal and in the court appealed from, a bond in such sum as the court shall fix to answer for such costs, expenses, and damages as the People of Porto Rico might suffer by reason of said action.

"The said appeal shall prosecute pursuant to the provisions of law for appeals in civil cases, and the court of appeals shall hold the hearing with preference over any other matter pending before it.

"Section 6. Any taxpayer filing a suit against the Treasurer of Porto Rico in accordance with the provisions of this Act shall attach to the said suit the receipt for the tax paid under protest, or a certified copy of said receipt.

"Section 7. That the sum of fifteen thousand (15,000) dollars or such part thereof as may be necessary is hereby [fol. 80] appropriated, out of any funds in the Insular Treasury, not otherwise appropriated, for the payment by the Treasurer of Porto Rico of such costs as by judgment of any competent court may be allowed to any taxpayer who shall have brought suit pursuant to this Act.

"Section 8. Act No. 17 of May 13, 1920, as well as all laws or parts of laws in conflict herewith are hereby re-

pealed; provided, that any action, proceeding or right arising from and exercised under the act hereby repealed, shall continue under the protection and provisions thereof until its termination.

"Section 9. It is hereby declared that an emergency exists for the immediate taking effect of this Act, and therefore the same shall take effect immediately after its approval."

6. That in accordance with said act of the Legislature of Porto Rico as hereinbefore stated the complainants are bound by the very nature of their business and occupation to pay an oppressive duty upon every article, goods, wares or merchandises brought from the United States into Porto Rico amounting to 10 per cent ad valorem over said goods, wares and merchandises, and if said excise duty would be paid under protest the complainants would be bound to make a protest for every case whenever a sale is effected, amounting to several thousand in one single year; and complainants would be bound to file a suit in every case protested in order to recover the amount of the excise, all of which would amount to a multiplicity of suits and legal proceedings of an unwarranted amount and put the complainants to great expense of time and money.

7. That by an Act of the Congress of the United States of America of April 12, 1900, it was enacted:

"Whenever the Legislative Assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this Act established, and shall by resolution duly [fol. 81] passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date, all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico."

And by another act of Congress of March 2, 1917, it was enacted:

"Section 58. That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs, and duties on importations into Porto Rico prescribed by the Act of Congress entitled: 'An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes,' approved April twelfth, nineteen hundred, are hereby continued in effect, and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed."

8. That the complainants have been threatened by the agents of the defendant with the seizure of their property and confiscation thereof to apply the proceedings of their sale to the payment of the illegal excise tax imposed upon the wares, goods and merchandises the property of the complainants brought from the United States into Porto Rico as aforesaid. And complainants allege that by the General Tax Laws of Porto Rico the complainants are taxed and pay upon the same property an annual tax of two percent ad valorem.

9. And complainants allege that they verily believe that the defendant personally or by his agents will immediately proceed to seize and confiscate all the properties of the complainants consisting in goods, wares and merchandises [fol. 82] brought from the United States into Porto Rico to be sold in this island exactly in the same conditions in which they were manufactured in the state of their origin; and by doing so will cause permanent and irreparable injury to the complainants totally wrecking their business and depriving the complainants of their lawful property without due process of law.

Complainants allege that said tax is illegal, unlawful, oppressive and unconstitutional for the following reasons:

1. Because it constitutes double taxation inasmuch as in accordance with the General Tax Laws or Political Code of Porto Rico the same property at the same time and under the same conditions has been taxed with a previous tax ad valorem.

2. Because it is an open violation of the laws of the United States that provide that in no event shall any duties of the kind complained of in this bill of complaint be imposed upon articles brought from the United States into Porto Rico.

3. Because the proceedings to make effective said tax are inquisitorial in their nature and really provide for the confiscation of the property of these complainants without due process of law.

4. Because the act of the Legislative Assembly of Porto Rico providing for payment of taxes under protest is not applicable to excise duties, by the very nature of this tax; and because it would be impossible to make payments under protest for every automobile or part of automobiles sold and then file a suit in the court of law for recovery of the tax paid.

And your complainants allege that they have no remedy at law to right the wrong of which they now complain.

Wherefore, your complainants most humbly pray that inasmuch as the complainants are without adequate remedy at law or except in a court of equity, for the wrongs and grievances herein complained of, said complainants pray [fol. 83] that the defendant herein, his agents and all persons under his authority, be perpetually enjoined and restrained from collecting or attempting to collect from complainants under pretext of enforcing the Act of July 28, 1923 as amended, any tax of the articles mentioned in paragraph VI of the complaint herein, whether in the original packages or package or after delivery by the carrier in the original packages or otherwise, and imported from the continental United States, and from embargoing, attaching, withholding or in any manner whatsoever interfering with said articles under the excuse or pretext that said defendant is enforcing said statute, and from in any manner enforcing or attempting to enforce against complainants herein the provisions of said act as amended and from interfering with the property and business of complainants by embargoes or otherwise for the attempted collection of any tax provided for by said act and under the pretext that said attempted collection is justified by the provisions of

such act and from prosecuting complainants or prosecuting or arresting officers or employees of complainant for removing goods in the original package from the possession of the steamship company or express company or post-office, or for having in their possession goods, whether in the original package or otherwise, upon which said alleged tax has not been paid, or from removing or otherwise disposing of any such goods on which no tax has been paid, or for failure to produce upon demand of any internal revenue official a true and authentic invoice covering such goods in the original package, and from detaining — or supposed to contain articles taxable or alleged by defendant to be taxable under said act, and from holding or otherwise interfering with the same under the pretext of enforcing said act; and that pending the final determination of this cause, the defendant, and all persons under his authority, be enjoined *pendente lite*, from enforcing or attempting to enforce against the complainants any of the provisions of said statute above mentioned and from collecting or attempting to collect from complainants the tax on any of the articles, [fol. 84] and from embargoing, attaching or in any manner whatsoever interfering with the complainants' property or business under such pretext, and from prosecuting complainants from doing any of the acts mentioned herein above in this paragraph; and that defendant be further enjoined to immediately release and return to complainants all goods and merchandise of complainant seized or embargoed by defendant by reason of the failure or refusal of complainants to pay the said tax and complainants further pray that a subpoena issue, directed to the said defendant, commanding him to appear and true answer make to each and every of the matters and things hereinbefore set forth, but not under oath, an oath being hereby expressly waived. And complainants further pray for such other and further relief as to the court may deem just and proper under the circumstances and allegations of the complaint.

San Juan, Porto Rico, August 12, 1925.

Cay. Coll Cuchi, Solicitor for Complainant.

*Duly sworn to by Adolfo Valdes. Jurat omitted in printing.)*

[fol. 85] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed August 19, 1925

Now come the attorney General of Porto Rico and undersigned counsel, in behalf of Juan G. Gallardo, Treasurer of Porto Rico, and respectfully allege:

First. That the bill of complaint herein filed does not state facts sufficient to constitute a good cause of action in equity.

Second. That complainant has an adequate, sufficient and complete remedy at law by payment under protest, as provided by Act No. 9 of June 23rd, 1924.

Wherefore the defendant prays the court to dismiss the bill of complaint with costs.

San Juan, Porto Rico, August 19, 1925.

George C. Butte, Attorney General of Porto Rico.  
J. A. Lopez Acosta, of Counsel.

Copy received this nineteenth day of August, 1925.  
Cay. Coll Cuchi, Attorney for Plaintiff.

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IN UNITED STATES DISTRICT COURT

FINAL DECREE—September 30, 1925

This cause came on to be heard in this term, and was submitted to the court on the pleadings filed by the parties.

It appears from the facts alleged in the complaint that the complainant, J. Ochoa & Hno., is a partnership organized according to the laws of Porto Rico, and that its business is the selling of automobiles, which are bought by the said complainant in the United States; that the amount involved in the said business is more than \$3,000, and that the Legislature of Porto Rico on July 28, 1923, passed an act levying excise taxes on the sale of automobiles, which law was amended on August 27, 1923, and on June 23, 1924. [fol. 86] It is alleged by the complainant that said act of

the Legislature of Porto Rico is unconstitutional, because the levying of said tax amounts to a tax on importations, because it imposes a double taxation, and because it imposes a tax on property. *It is also alleged that the complainant has no adequate, sufficient and expedient remedy at law.*

The defendant has filed a motion to dismiss, on the grounds that even though the facts alleged in the complaint were proven, the complainant has no right to remedy by injunction, because the tax imposed is an excise tax, imposed after the article has acquired a situs in the Island of Porto Rico, and the tax is levied and collected when the article is sold, and after it has become a part of the mass of property of the taxpayer.

The facts alleged in the complaint, the law involved in the suit, and the remedy prayed for, are identical to the facts, the law and the remedy of the cases of the Insular Motor Corp. v. Gallardo, Equity No. 1286 of this court, and with the case of Smallwood Bros. v. Gallardo, Equity No. 1285 of this court, which were decided by this court on September 18, 1925, dismissing the bill of injunction with costs.

The construction of the excise tax law of 1923, as amended on August 27, 1923, and June 23, 1924, was studied in those cases, and this court, following the decision entered in the case of West India Oil Co. v. Gallardo decided by the United States Circuit Court of Appeals, First Circuit, held that the tax imposed was a tax on sales, adopted within the powers and authority of the Legislature of Porto Rico, and was not a tax on importation or property, and that it did not constitute double taxation. This court had an opportunity to construe this law in its application, in appreciating the evidence in the case of the Insular Motor Corp. v. Gallardo, *supra*, and this court was convinced that the tax was collected after the sale of the article, and when the taxpayer's possession of the merchandise was complete.

In studying the decision rendered by the Circuit Court of [fol. 87] Appeals, First Circuit, in the West India Oil Co. case, this court came to the conclusion that said decision is controlling and binding in this case, and it is hereby

ordered, decreed and adjudged that the petition for injunction filed by the complainant be, and is hereby, dismissed with costs, to which decree the complainant duly excepts.

San Juan, Porto Rico, this thirtieth day of September, 1925.

Ira K. Wells, Judge.

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IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND FOR SUPERSEDEAS—Filed October 8, 1925

To the Hon. Ira K. Wells, Judge of the District Court of the United States for the District of Porto Rico:

The petition of the complainants respectfully represents:

That petitioners are aggrieved by the judgment and decree herein rendered on September 30, 1925, in favor of the defendant and against the said complainants, ordering the dissolution of a preliminary injunction in this case, and that petitioners, for the reasons specified in the assignment of errors filed herewith, desire to appeal and do hereby appeal from said decree, and desire that said appeal, returnable to the Circuit Court of Appeals for the First Circuit, shall operate as a supersedeas and may suspend during the pendency of said appeal the effect of said order and decree of dissolution.

Wherefore, the petitioners pray that the said appeal may be allowed, and that, upon their giving bond in an amount to be fixed by this court, the said appeal may operate as a supersedeas and may suspend during the pendency of said appeal the effect of said decree of dissolution; that said appeal be made returnable to the United States Circuit Court of Appeals for the First Circuit, according to law, and that a transcript of the record, proceedings and papers and exhibits upon which said decree was rendered, duly authenticated, be sent to the said Circuit Court of Appeals. And petitioners pray for all general and equitable relief.

San Juan, Porto Rico, October 6, 1925.

Cay. Coll Cuchi, Solicitor for Complainants.

## IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND SUPERSEDEAS—October 8,  
1925

Considering the foregoing petition this day presented it is ordered that an appeal be allowed to the petitioners and complainants in this suit, from the decree of September 18, 1925, rendered against said complainant in the above entitled and numbered cause, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the First Circuit, and that upon the execution of a bond in the penalty of five thousand dollars said appeal shall operate as a supersedeas of said decree and shall suspend, until the final decree or appeal herein, the effect of the order dissolving the preliminary injunction herein, and that a transcript of the record, including all of the exhibits offered in evidence by either party, be filed in the United States Circuit Court of Appeals, according to law, as prayed for.

San Juan, Porto Rico, October 8, 1925.

Ira K. Wells, District Judge.

## IN UNITED STATES DISTRICT COURT

## ASSIGNMENTS OF ERROR—Filed October 8, 1925

Now, on the sixth day of October, 1925, came the said complainant, by Cay. Coll Cuchi, its solicitor, and says that the decree in said cause is erroneous and against the just rights of the said complainant, for the following reasons:

1. Because the Act No. 68 of the Legislature of Porto Rico of 1923, as amended by Act No. 1, of August 27, 1923, and by Act No. 6, of June 23, 1924, is null and void because [fols. 89 & 90] it constitutes double taxation inasmuch as in accordance with the General Tax Law or Political Code of Porto Rico the said property at the same time and under the same conditions, has been taxed with a previous tax *ad valorem*, and with a previous tax upon the occupation or business of the complainant.

2. Because the said laws are in open violation and contradiction of the laws of the Congress of the United States, that provide that in no event shall any duties of the kind complained of in the bill of complaint herein, be imposed upon articles brought from the United States into Porto Rico.

3. Because the proceedings to make said tax effective are in the nature of a confiscation of the property of this complainant, without due process of law.

San Juan, Porto Rico, October 6, 1925.

Cay. Coll Cuchi, Solicitor for Complainant.

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Bond on appeal for \$5,000, approved and filed October 19, 1925, omitted in printing.

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[fol. 91] Citation, in usual form, showing service on Juan G. Gallardo, omitted in printing.

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[fol. 92] IN UNITED STATES DISTRICT COURT

PRECEPTE FOR TRANSCRIPT OF RECORD—Filed October 17, 1925

To the Clerk:

You are requested to take a transcript of the record to be filed in the United States Circuit Court of Appeals for the First Circuit, pursuant to an appeal allowed in the above entitled case and to include in said transcript of record the following and no other papers or exhibits, to wit:

Complaint.

Motion to Dismiss.

Decree.

Petition for an Appeal.

Order Allowing Appeal.

Assignment of Errors.

Supersedeas Bond.

The Citation.

The Præcipe.

Respectfully, Cay. Coll Cuchi, Attorney for Com-  
plainants-Appellants.

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[fols. 93 & 94] Clerk's certificate to foregoing transcript  
omitted in printing.

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[fol. 95] IN UNITED STATES DISTRICT COURT, DISTRICT OF  
PORTO RICO

No. 1312. Equity

INSULAR MOTOR CORPORATION, Complainant,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico, Defendant

Bill to Recover an Illegal Tax and for an Injunction

BILL OF COMPLAINT—Filed October 8, 1925

To the Honorable Ira K. Wells, Judge of the District Court  
of the United States for Porto Rico:

Now come the complainant above-named, by the under-  
signed solicitor, and respectfully shows:

1. That the complainant is a corporation duly organized  
under the laws of Porto Rico and doing business in this  
island.

The defendant, Juan G. Gallardo, is an American citizen  
[fol. 96] and the Treasurer of Porto Rico, with residence  
within this district, duly appointed and qualified, and act-  
ing as such Treasurer during all times referred to in this  
bill of complaint.

2. That the only and exclusive business of the complain-  
ant consists in the sale of automobiles and automobile ac-  
cessories; and that each and all of the goods and mer-

chandise sold by the complainant in its regular course of business are manufactured, produced and built in the United States, principally in the States of Michigan and New York, and brought into Porto Rico under regular invoices and bills of lading showing the State from which they are thus brought within this jurisdiction; said goods, wares and merchandise being sold by the complainants to the public at large in exactly the same conditions in which they are brought into Porto Rico without any process of further manufacture or improvement or betterment than that of their original condition.

And complainant alleges that it is engaged in the importation of auto cars from the United States to be sold in Porto Rico; that the complainant has invested in said business more than one hundred thousand dollars and that the continuation and development of said business is based entirely upon the importation of motor cars and accessories thereof from the States as aforesaid; that the complainant has imported during the past thirty days motor cars on which taxes hereinafter mentioned would exceed the sum of three thousand dollars; all of which taxes are levied against importation upon goods manufactured in the United States and imported therefrom into Porto Rico; that complainant is and will continue to import said goods during this year, upon which, unless the relief herein invoked is granted, it will be compelled to pay the said taxes to an amount not less than twenty-five thousand dollars; that the value of motor cars made in the United States to be imported by the complainant this year will amount to not less than two hundred and fifty thousand dollars.

3. That the Legislative Assembly of Porto Rico passed an Act, which was duly approved by the Governor, on the twentieth day of August, 1925, entitled "An Act to provide revenues for the People of Porto Rico by levying certain [fol. 97] sale taxes and taxes for the manufacture, use, sale and consumption of certain products and by the levying of certain excise and license taxes on certain occupations, industries or business; to impose certain penalties; to repeal the laws in force providing for excise and license taxes; and for other purposes"; said Act to be known as "Internal Revenue Law of Porto Rico"; and that by virtue

of said Internal Revenue Law and excise tax upon the goods, wares and merchandise, sold by the complainant as aforesaid, which said tax complainant alleges is an illegal, oppressive and wrongful tax, for the reasons to be hereinafter alleged, is provided for as follows:

"Section 16. There shall be collected and paid, once only, an internal revenue tax on each of the following articles:

15. Motor Vehicles. On every motor vehicle such as automobiles, trucks, tractors, autocars and trailers, by whatever name known; on chassis, motors, boates, inner tubes and solid or pneumatic tires of such vehicles; on motorcycles and launches, with or without mounted motors or motors for the same, and on solid or pneumatic tires for motorcycles and launches, with or without mounted motors Rico, a tax of seven (7) per cent ad valorem.

Persons, not residents of Porto Rico, using their own automobiles for personal use only, shall be exempt from payment of the tax prescribed by this Act for such period as they shall use the special license of the Commissioner of the Interior. On the expiration of that period or upon acquiring the regular license of the said Commission, or before, if the automobile is devoted to purposes other than the above mentioned the internal revenue tax shall be paid."

That the Legislative Assembly of Porto Rico passed a law, duly approved by the Governor, on the 23d of June, 1924, entitled "An Act providing for the payment of taxes under protest, etc.", as follows:

"Section 1. Whenever a taxpayer believes that he should not pay a tax or part thereof because he understands that it is illegal, excessive or wrongful, he shall, however, have [fol. 98] the obligation to pay the same in full upon request of the collector of taxes of his district, or of the official in charge of the collection of taxes, and shall ask the said collector or the said official in charge of the collection of taxes, should he desire to make any claim, to endorse the tax receipt specifically stating whether the said protest refers to the whole or to a part of the tax paid under protest, and setting forth the exact amount protested. The said endorsement shall be signed by the taxpayer and by the collector or officer in charge of the collection of taxes.

Section 2. After payment is made the collector of taxes, or the official in charge of the collection of taxes, shall cover the sum collected into the Treasury of Porto Rico, reporting to the Treasurer the total amount of the tax, as well as the part thereof paid under protest.

Section 3. The moment that a tax paid under protest is received, the part thereof not protested, if there be any, shall be considered as all other receipts from taxes, the amount of which is to be applied to the obligations of the Insular Government, and in the case of property taxes the part of said tax pertaining to the respective municipalities pursuant to law, shall be paid over to them. The protested part shall be covered into a special fund to be known as 'Taxes paid under protest—Trust Fund'.

Section 4. A taxpayer who shall have paid under protest the whole or part of any tax shall, within a term of not to exceed thirty days from and after the date of payment, sue the Treasurer of Porto Rico in a court of competent jurisdiction to secure the return of the amount protested. The Treasurer of Porto Rico, through the Attorney General or through the official designated by the latter from his department, shall answer the said suit within the term granted by law for the filing of answers and shall make therein, in their order, allegations to strike out particulars of the complaint and demurrers.

When the case is ready for trial the court before which [fol. 99] the action is pending shall fix the day for the trial thereof without the necessity of a request from the parties, first serving due notice on them.

When final decision is rendered, if favorable to the taxpayer, the Treasurer of Porto Rico shall proceed to return to him the amount directed in the decision to be charged against the fund 'Taxes paid under protest—Trust Funds,' referred to in section 3 hereof.

If the decision be favorable to the People of Porto Rico, the Treasurer shall cover from the fund known as "Taxes paid under protest—Trust Fund" into the proper fund such amount of the tax as directed by the court in its decision, turning over to the respective municipalities the proportion established by law in cases of property taxes.

Section 5. Either party may appeal to a higher court by filing in the court a quo his appeal within ten days after the decision is rendered, as provided by section 4 of this Act; provided that if the taxpayer be the appellant he shall file, together with the petition for appeal and in the court appealed from, a bond in such sum as the court shall fix to answer for such costs, expenses and damages as the People of Porto Rico might suffer by reason of said action.

The said appeal shall be prosecuted pursuant to the provision of law for appeals in civil cases, and the court of appeals shall hold the hearing with preference over any other matter pending before it.

Section 6. Any taxpayer filing a suit against the Treasurer of Porto Rico in accordance with the provisions of this Act shall attach to the said suit a receipt for the tax paid under protest, or a certified copy of said receipt.

Section 7. That the sum of fifteen thousand (15,000) dollars or such part thereof as may be necessary is hereby appropriated, out of any funds in the Insular Treasury, not otherwise appropriated, for the payment by the Treasurer of Porto Rico of such costs as by judgment of any competent court may be allowed to any taxpayer who shall have [fol. 100] brought suit pursuant to this Act.

Section 8. Act No. 1 of May 13, 1920, as well as all laws or parts of laws in conflict are hereby repealed: provided, that any actions, proceeding or right arising from and exercised under the act hereby repealed, shall continue under the protection and provisions thereof until its termination.

Section 9. It is hereby declared that an emergency exists for the immediate taking effect of this Act, and therefore the same shall take effect immediately after its approval."

That in accordance with the said acts of the Legislature of Porto Rico as hereinbefore stated the complainants are bound by the very nature of their business and occupation to pay an oppressive duty upon every article, goods, wares, or merchandise brought from the United States into Porto Rico amounting to 7 per cent ad valorem over said goods, wares and merchandise, and if said excise duty would be paid under protest the complainants would be bound to

make a protest for every case whenever a sale is effected, amounting to several hundred protests in one single year; and complainants would be bound to file a lawsuit in every case protested in order to recover the amount of the excise, all of which would amount to a multiplicity of suits and legal proceedings of an unwarranted amount that would put the complainants to great expense of time and money.

6. That by an Act of the Congress of the United States of America, of April 12, 1900, it was enacted:

"Whenever the Legislative Assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the Government of Porto Rico by this Act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free [fol. 101] of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and articles going into Porto Rico from the United States, or coming into the United States from Porto Rico."

And by another Act of Congress of March 2, 1917, it was enacted:

"Section 53. That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs, and duties on importations into Porto Rico prescribed by the Act of Congress entitled: 'An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes,' approved April twelfth, nineteen hundred, are hereby continued in effect and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed."

That the complainants have been threatened by the agents of the defendants with the seizure of its property and confiscation thereof to apply the proceedings of their

sale to the payment of the illegal excise tax as imposed upon the wares, goods and merchandise the property of the complainant brought from the United States into Porto Rico as aforesaid; and complainant alleges that by the General Tax Laws of Porto Rico the complainant is taxed and pays upon the same property an annual tax of two per cent ad valorem.

8. And complainant alleges that it verily believes that the defendant personally or by his agents will immediately proceed to seize and confiscate all the properties of the complainant consisting in goods, wares and merchandise brought from the United States into Porto Rico to be sold in this island exactly in the same condition in which they were manufactured in the state of their origin; and by doing so will cause permanent and irreparable injury to the complainant, totally wrecking its business and depriving the complainant of its lawful property without due process of law.

[fol. 102] Complainant alleges that said tax is illegal, unlawful, oppressive and unconstitutional for the following reasons:

1. Because it constitutes double taxation inasmuch as in accordance with the General Tax Law or Political Code of Porto Rico the same property, at the same time and under the same conditions, has been taxed with a previous tax ad valorem, and with a previous tax on complainant's occupation; and with a previous sale tax.

2. Because it is an open violation of the laws of the United States that provide that in no event shall any duties of the kind complained of in this bill of complaint be imposed upon articles brought from the United States into Porto Rico.

3. Because the proceedings to make effective said tax are inquisitorial in their nature and really provide for the confiscation of the property of these complainants without due process of law.

4. Because the Act of the Legislative Assembly of Porto Rico providing for payment of taxes under protest is not applicable to excise duties by the very nature of this tax, and because it would be impossible to make payments un-

der protest for every automobile or part of automobiles sold and then file a suit in the court of law for recovery of the tax paid.

5. Because the said tax is against the Organic Law of Porto Rico and the Constitution of the United States requiring uniformity of taxation.

And your complainants allege that they have no remedy at law to right the wrong of which they now complain.

Wherefore, inasmuch as the complainant is without adequate remedy at law or except in a Court of Equity, for the wrong and grievances herein complained of, said complainant prays that the defendant herein, his agents and all persons under his authority, be perpetually enjoined and restrained from collecting or attempting to collect from complainant, under pretext of enforcing the Act of July 20, 1925, any tax on the articles mentioned in paragraph 6 of the complaint herein, whether in the original packages or [fol. 103] package or after delivery by the carrier in the original package or otherwise, and imported from the continental United States, and from embargoing, attaching, withholding or in any manner whatever interfering with said articles under the excuse or pretext that said defendant is enforcing said statutes, and from in any manner enforcing or attempting to enforce against complainant herein the provisions of said Act as amended, and from interfering with the property and business of complainant by embargoes or otherwise for the attempted collection of any tax not provided for by said Act and under the pretext that said attempted collection is justified by the provisions of such Act, and from prosecuting complainant or prosecuting or arresting officers or employees of complainant for removing goods in the original package from the possession of the steamship company or express company or post office, or for having in their possession goods, whether in the original package or otherwise, upon which said alleged tax has not been paid, or from removing or otherwise disposing of any such goods on which no tax has been paid, or for failure to produce upon demand of any internal revenue official a true and authentic invoice covering such goods in the original package, and from detaining and examining any package, original or otherwise, containing

or supposed to contain articles taxable or alleged by defendant to be taxable under said Act, and from holding or otherwise interfering with the same under the pretext of enforcing said Act; and that pending final determination of this cause the defendant, and all persons under his authority, be enjoined pendente lite from enforcing or attempting to enforce against the complainant any of the provisions of the said statute above mentioned and from collecting or attempting to collect from complainant the tax on any of the said articles, and from embargoing, attaching or in any manner whatsoever interfering with the complainant's property or business under such pretext, and from prosecuting complainant or complainant's officers or employees under such pretext and from doing any of the acts mentioned hereinabove in this paragraph; and that defendant be further enjoined to immediately release and return to the complainant all goods and merchandise of [fol. 104] complainant seized or embargoed by defendant by reason of the failure or refusal of complainant to pay the said tax, and complainant further prays that a subpoena issue directed to the said defendant, commanding him to appear and true answer make to each and every of the matters and things hereinbefore set forth, but not under oath, an oath being hereby expressly waived. And complainant further prays for such other and further relief as to the court may seem just and proper under the circumstances and allegations of the complaint.

San Juan, Porto Rico, September 29, 1925.

Cay. Coll Cuchi, Solicitor for Complainant.

*Duly sworn to by Jackson C. Hitchman. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ANSWER—Filed November 4, 1925

To the Honorable Ira K. Wells, Judge District Court of the United States for Porto Rico:

Now come the Attorney General of Porto Rico and the undersigned counsel in behalf of the defendant, the Treas-

[fol. 105] urer of Porto Rico, and in answer to the bill of complaint filed herein respectfully alleges:

1. Defendant admits paragraph 1 of the complaint.

2. For want of information, defendant denies each and every allegation of paragraph 2 of the complaint, and especially that the goods, wares and merchandise sold by complainant, if any, are sold in the same condition in which they are received from the sellers in the United States; and defendant furthermore denies that complainant is engaged in the business of importation of cars; otherwise alleging that complainant's business is, as far as the knowledge received on information by defendant, the sale of automobiles after they are in the market and have become part of the mass of property of complainant, which sale is made not to specific persons, but to anybody who happens to buy an automobile of the make or makes in stock in the hands of complainant. Defendant furthermore denies, for want of information, the amount of money therein alleged as invested by said complainant in its business, or that the amount of taxes alleged in the complaint is the one that must be paid by said complainant. And defendant furthermore denies that the taxes involved in this suit and under collection, and for which alleged distraint was threatened, reach the sum of three thousand (3,000) dollars.

3. Defendant admits paragraph 3 of the complaint as to the approval, by the Legislature of Porto Rico, of the excise tax law of 1923, and the existence in said law of section 20, subdivision 18, taxing motor vehicles, but denies that the tax imposed and assessed by said law is illegal, oppressive or wrongful.

4. Defendant admits paragraph 4 of the complaint, but alleges that the law of payment under protest, as quoted therein has been amended by the Legislature of Porto Rico in the year of 1925.

5. Defendant, in answering paragraph 5 of the complaint, admits that plaintiff is bound to pay the seven per cent ad valorem therein alleged, but denies each and every other allegation of the said paragraph, and especially that the tax is oppressive, or that its collection will amount to

a multiplicity of suits, causing complainant any irreparable injury.

[fol. 106] 6. Defendant admits paragraph 6 of the complaint.

7. Defendant denies each and every allegation of paragraph 7 of the complaint, and especially that plaintiff has been threatened by defendant, or that any proceedings, either civil or criminal, have been instituted, or have been threatened to be instituted, against plaintiff.

8. Defendant denies each and every allegation of paragraph 8 of the complaint, and especially that defendant will seize or confiscate any property of plaintiff, or in any way will cause complainant's business an irreparable injury. And defendant especially denies that the Internal Revenue Law is unconstitutional, oppressive, or constitutes a tax on property, or in any way contradicts the Constitution of the United States or the Organic Act of Porto Rico; and defendant furthermore denies that plaintiff has no adequate remedy at law.

#### Special Defence

At a special defence, defendant alleges:

That the excise tax imposed and levied according to section 16, as well as the sales tax imposed and levied in accordance with section 62 of Act No. 85 of 1925, known as the Internal Revenue Law of Porto Rico, and excises assessed, imposed and collected on the sale of the article, when said article has become part of the mass of property of the taxpayer, and when the possession has been transferred by the sale from the vendor to the vendee, and after the article has acquired a situs in the Island of Porto Rico; that Act No. 85, above mentioned, is an internal revenue law approved by the Legislature of Porto Rico within the powers granted by the Organic Act of 1917, and does not contravene or oppose the Constitution of the United States, which is not per se in force in Porto Rico, nor is it contrary to any of the provisions of the Organic Act above mentioned, or to any federal statute enforceable in the island.

Wherefore, your defendant prays the court to dismiss the bill of complaint herein filed with costs against plaintiffs granting any other remedy that it may deem meet and proper.

San Juan, Porto Rico, November 3, 1925.

George C. Butte, Attorney General of Porto Rico,  
J. A. Lopez Acosta, of Counsel.

[fol. 107] Notified with copy this fourth day of November, 1925.

Cay. Coll Cuchi, Attorney for Complainant.

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IN UNITED STATES DISTRICT COURT

RULE TO SHOW CAUSE—Filed October 2, 1925

Whereas, in the above named cause it has been made to appear upon the bill of the complainants filed herein that a writ of injunction preliminary to the final hearings is proper, and that prima facie the complainants are entitled thereto, enjoining the defendant herein from the acts complained of and threatened to be committed.

Now, on motion of said complainants, it is ordered that the defendant appear before this District Court of the United States for Porto Rico at the court room of said court at San Juan, P. R., upon the twelfth day of October, 1925, at 9 o'clock of said day, and then and there show cause why the preliminary injunction therein prayed for should not be issued.

Further ordered that a copy of this order, certified under the hand of the clerk and seal of this court, be served upon the defendant herein together with a copy of the bill of complaint herein filed.

San Juan, P. R., October 2, 1925.

Ira K. Wells, Judge.

## IN UNITED STATES DISTRICT COURT

STIPULATION AND AGREEMENT OF FACTS—Filed October 15,  
1925

To the Honorable Ira K. Wells, United States District  
Judge:

Now come the parties above mentioned, the plaintiffs represented by their attorney, Cay, Coll y Cuchi, and the defendant by the Attorney General of Porto Rico and the undersigned counsel, and stipulate and agree as follows:

That in the above-entitled cases, now pending trial before the United States District Court for Porto Rico, the defendant, Juan G. Gallardo, will not issue orders to institute criminal proceedings against the persons of the plaintiffs, or issue orders of attachment against their property, and on the other hand the plaintiffs agree to stipulate and file the monthly sworn statements required by Sections 63, 64, 65 and 66 of Act No. 85 (Internal Revenue [fol. 108] Law of 1925), and also to furnish the information required by the Treasurer in connection with excise taxes imposed by Section 16 of the Act above referred to. It is understood by the parties that this information is to be furnished only with the object of liquidating the tax, and that none of the parties will forfeit any right, privilege or remedy involved in the cases now before this court.

That this stipulation and agreement shall be effective and valid from the date of its approval by this court, and only until the date of the decision of these cases by this court, and no longer.

San Juan, Porto Rico, October 15, 1925.

Cay, Coll y Cuchi, Attorney for Complainant. George  
C. Butte, Attorney General of Porto Rico. J. A.  
Lopez Acosta, of Counsel.

Approved: Ira K. Wells, Judge.

## IN UNITED STATES DISTRICT COURT

OPINION—January 8, 1926

WELLS, J.:

All of the questions in this case both of fact and of law [fol. 109] were at issue in the case of *J. Ochoa y Hermano v. Juan G. Gallardo*, Treasurer of Porto Rico, being equity case No. 1313, and the decision rendered this date therein settles the questions involved in this case.

For the reasons given in said opinion I find that there is a lack of equity shown in this case and that the complainants have and are acting in an inequitable manner in regard to these taxes. That the complainants have an adequate remedy at law, and that they have failed to show any irreparable loss or damage. That the taxes complained of are valid and legal in every respect. The petition for injunction is therefore denied and the bill dismissed at the cost of the complainants, and decree will be entered in accordance with this opinion.

Dated at ~~San Juan~~ Porto Rico, this eighth day of January, A. D. 1926.

Ira K. Wells, Judge.

In the District Court of the United States for the District  
of Porto Rico

Equity. No. 1313

ADOLFO VALDES, PIO PEREZ, LUIS C. CUYAR, and SALVADOR  
GARCIA, Copartners, Doing Business under the Firm Name  
and Style of *J. Ochoa y Hno.*, Complainants,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico, Defendant

Mr. J. Henri Brown, Attorney for Complainants.

Honorable George C. Butte, Attorney General of Porto  
Rico and Assistant Attorney Generals J. A. Lopez Acosta  
and James R. Beverley, Attorneys for the Defendant.

## Opinion of District Court January 8, 1926

WELLS, J.:

The complainants are co partners, doing business under the name and style of J. Ochoa y Hno., and are all subjects of the King of Spain residing in Porto Rico, with the exception of Luis C. Cuyar, who is a citizen of the United States, residing and domiciled in the Island of Porto Rico.

The defendant, Juan G. Gallardo, is the duly qualified [fol. 110] and acting Treasurer of Porto Rico, of which he is a resident and in which he is domiciled.

The complainants are now and have been for many years engaged in the business of selling provisions, building material, supplies and other merchandise at wholesale in the City of San Juan, Porto Rico. The complainants purchase and import from the continental United States and from foreign countries all the articles sold by them in their business. They import cement from Denmark, which they sell in the original barrels in which the same is imported and they also import matches from Santo Domingo, which they also sell in their original packages.

The articles imported and sold by said complainants are subject to the Internal Revenue Law of Porto Rico passed by the 1925 Legislature.

This is a bill in equity to enjoin the enforcement, as against the complainants, of the Internal Revenue Law enacted by the Legislature of Porto Rico and approved by the Governor on August 20, 1925. The bill is founded upon allegations that the enforcement of the law and taxes imposed thereby would violate the due process and equal protection clauses of the Fourteenth Amendment and the Commerce Clause to the Constitution of the United States and also the Organic Act of Porto Rico. It alleges discriminations against imports from the United States and from foreign countries in favor of domestic products and manufactures and to unlawfully burden foreign and interstate commerce. It is also claimed that apart from interference with commerce, foreign and interstate, the taxes imposed by the law violate the principles of uniformity prescribed by the Organic Act of Porto Rico and imposes

unequal burdens on members of the same class and that the taxes are confiscatory.

Act number 85 of the Laws of Porto Rico of 1925, approved August 20, 1925, is entitled: "An act to provide revenues for the People of Porto Rico by levying certain sales tax and taxes for the manufacturers' use, sale and consumption of certain excise and license taxes on certain [fol. 111] occupations, industries or businesses; To impose certain penalties; To repeal the laws in force providing for excise and license taxes, and for other purposes."

This law is known as the Internal Revenue Law of Porto Rico and is divided into several headings and titles, as follows:

Title I. Definitions.

Title II. Excise Taxes.

Title III. Sales Taxes.

Title IV. License Taxes.

Title V. Administrative Provisions.

Title VI. Judicial and Administrative Provisions.

Title VII. General Duties of Employees of the Department of Finance in connection with the Internal Revenue Law.

This is an attack upon that part of this law designated as "Excise Taxes," which is dealt with in Title II of the Act, and the other denominated "Sales Taxes," which is dealt with in Title III of the Act.

The material sections of Title II, involving excise taxes, are as follows:

"Section 16. There shall be collected and paid, once only, an internal revenue tax on each of the following articles."

Then follows a list of 44 articles, including such things as alcohol, cigars, playing cards, matches, pianos, billiard tables, etc., and on "production, manufacture, sale, use or consumption in Porto Rico" on which varying taxes are laid. These taxes are invariably laid upon the sale, production, manufacture, use, transfer or consumption of the articles. Some of the taxes are levied on a quantitative basis, and some on an ad valorem basis.

Section 4 of the law defines the phrase "ad valorem" as follows:

"For the purposes of this Act, the phrase 'ad valorem' shall be construed to mean the cost of the article when in possession of the person, plus a reasonable profit to be estimated at ten per cent (10%) of said cost, if such person fails to prove, to the satisfaction of the Treasurer of Porto Rico, that the profit obtained on such articles is less than the aforesaid percentage: Provided, That the word 'person' as used in this section shall have the meaning given thereto in section 5 of this Act."

The word "person" is defined in section 5 to include not only the natural persons and all manufacturers or dealers, but also the partnerships, associations of all classes, limited liability joint stock companies, companies, corporations or any other artificial person.

Section 17 of the law provides:

"Dealers shall be liable for the payment of the tax upon selling or transferring the taxable article to another dealer or to a consumer."

Section 18 provides:

"The consumer shall be liable for the payment of the tax upon coming into possession of the taxable article for use or consumption in Porto Rico."

Section 19

"Taxes prescribed by this Act on the sale, transfer, use or consumption in Porto Rico of articles comprised in section 16 shall be paid by the dealer upon selling or transferring the taxable article to another dealer or to a consumer."

The material sections of Title III, involving sales taxes, are as follows:

"Section 62. There shall be levied and collected on the sale of any article, the object of commerce not specified in section 16 of this act or exempted from taxation as provided in said section, a tax of two (2) per cent on the price

or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sales."

[fol. 113] And Section 83, relating to exemptions, provides:

"Any person comprised within the provisions of Section 62 of this Act, except manufacturers whose total monthly sales do not exceed one hundred (100) dollars, shall be exempt from the payment of the tax specified in said section: Provided, That when one person alone shall have several businesses, under separate accounts, the amounts of the monthly sales of these should together amount to less than one hundred (100) dollars so as to be comprised within the exemption hereby established: Provided, further, That the tax provided by Section 62 of this Act shall not attach to (1) food stuffs; (2) fluid gas; (3) electric current; (4) fertilizers, as well as all raw materials used in the manufacture of fertilizers; (5) charcoal and wood; (6) jewels and precious and semi precious stones; (7) the sales made by agriculturists of their crops and live stock; (8) the sale of newspapers, to newspaper advertisements and literary, scientific and philosophical works and to public school text books."

The defendant Treasurer construes Section 62 of this Act covering the "Sales Taxes" as applying only to the first sale in Porto Rico and not as to any subsequent sales.

#### Jurisdictional Amount

This is a suit for injunction and the amount in controversy is determined by the value to the complainants of the right which they assert in good faith and is the subject of the bill, or the value to the complainants of the rights for which they pray protection, which in this case the court holds to be in excess of the sum of three thousand dollars.

#### Equitable Jurisdiction

It has been uniformly held that the illegality or unconstitutionality of a state or municipal tax is not of itself

a ground for equitable relief in the courts of the United States. I do not believe that any irreparable damages have been shown in this case. The damage which the complainants would suffer, as is shown by a fair consideration of all [fol. 114] the testimony, is the amount of the supposed illegal tax which they would have to pay. The result of the evidence in this case is that the complainants rely solely upon the supposed invalidity of this law.

This is a suit for an injunction to restrain the defendant Treasurer from collecting from complainants a tax which complainants have already collected in part from their customers and which money they now have in their own pockets and which was collected from their customers solely and alone by reason of the tax in question, and the complainants are now seeking to enjoin the defendant Treasurer from collecting this tax. They have collected a part of this tax from their customers and are attempting to collect it in every instance, but yet are refusing to pay it, or any part of it, to the Government, under whose law they represent to their customers they are collecting it. They now come into this court and ask this court to protect them in withholding from the Government of Porto Rico money collected by them from their customers under this tax law which they are seeking to evade.

They are virtually saying to the Government of Porto Rico, here, we have collected part of this tax which we are compelled to pay under this law from our customers, by reason of their belief that we must pay it to the Government of Porto Rico, yet now that we have this money expressly paid to us by reason of this tax and for that express purpose, we will keep the same in our pockets and not pay it to you because we think that you have no right to collect it from us. That the money we have collected from our customers and will collect in the future, by reason of this tax, under the belief of our customers that the same was to be paid to the People of Porto Rico, we will keep in our pockets. The complainants treat this law as valid when it comes to collecting the tax from their customers and invalid when it comes to paying it to the Government. They are attempting to blow hot and blow cold at the same time. He who comes into equity must come with clean

hands. It is the universal rule that equity courts will not interpose to suitors who show a lack of equitable dealing in the same subject matter;

[Vol. 115] A court of equity endeavors to enforce the doctrine of good faith and good conscience upon the defendant, but not in favor of any complainant who has himself acted outside of good conscience and good faith. He who seeks equity must do equity. Can it be said that it is equitable for the complainants to collect this tax about which they are complaining from their customers and then refuse to pay the same to the Government on the ground that it is illegal and unjust.

In the examination of Mr. Salvador Garcia, one of the complainants in this case (record, pages 37-38), he testifies as follows:

Q. Did you, during the month of September, 1925, collect from the purchasers to whom you sold any goods the two per cent sales tax?

A. We have charged the two per cent provided by the law, but we have not collected it because we sell at thirty and sixty days. Some customers have refused to pay this two per cent tax.

Q. Have you ever collected from any customer the two per cent sales tax?

A. We have collected from some customers.

Q. But you did not pay it to the Treasurer, did you?

A. We paid the amount collectible in the month of August, but as regards the amount due for September, we are awaiting the outcome of this case.

Q. So that the two per cent that you have collected from your customers during the month of September, 1925, is in your hands awaiting the outcome of this suit, is it?

Mr. Brown: He has not testified that he has collected the September tax.

A. We usually sell on terms of sixty days and we have charged our customers on that basis, but we have not collected yet, except in a few small cases where we have sold for cash.

Q. And where you sold for cash you still hold the money, do you?

A. Yes, we have the money awaiting the outcome of this case.

Q. And the two per cent which you have charged against your customers, who have thirty or sixty days bills, also de- [fol. 116] pend upon the outcome of this suit. Is that correct?

A. If we are compelled to pay we shall do so.

Q. And if you are compelled to pay you will charge the two per cent against your customers?

A. Some of them will accept it and some of them will refuse it.

Q. But you will try to collect it from your customers?

A. Yes."

#### Adequate Remedy at Law

Does the law of June 3rd, 1924, as amended August 20th, 1925, provide an adequate remedy at law?

Sections I and II of Act number 9 of the Special Session of the Porto Rico Legislature, 1924, provides:

"Section 1. Whenever a taxpayer believes that he should not pay a tax or part thereof because he understands that it is illegal, excessive or wrongful, he shall, however, have the obligation to pay the same in full upon request of the collector of taxes of his district, or of the official in charge of the collection of taxes, and shall ask the said collector or the said official in charge of the collection of taxes, should he desire to make any claim, to endorse the tax receipt specifically stating whether the said protest refers to the whole or to a part of the tax paid under protest, and setting forth the exact amount protested. The said endorsement shall be signed by the taxpayer and by the collector or officer in charge of the collection of taxes.

Section 2. After payment is made, the collector of taxes or the official in charge of the collection of taxes, shall cover the sum collected into the Treasury of Porto Rico, reporting to the Treasurer the total amount of the tax, as well as the part thereof paid under protest."

Sections III and IV of said Act of 1924 were amended by law number 84 of the Legislature of Porto Rico, 1925, to read as follows:

"Section 3. The moment that a tax paid under protest is received, the part thereof not protested, if there be any, [fol. 117] shall be considered as all other receipts from taxes, the amount of which is to be applied to the obligations of the Insular Government, and in the case of property taxes, the part of said tax pertaining to the respective municipalities, pursuant to law, shall be paid over to them. The protested part shall be paid covered into a special fund to be known as 'Taxes Paid Under Protest—Trust Fund,' to be there held until the final decision of a court of justice is rendered upon the legality of the collection of the taxes so protested, and likewise interest at the rate of six (6) per cent on the protested part shall be covered monthly into the said trust fund, taking the sum necessary therefor out of such moneys as may be available in the Treasury of Porto Rico, for which purpose the Treasurer of Porto Rico is hereby authorized and empowered to dispose of such moneys in the Treasury of Porto Rico.

"Section 4. A taxpayer who shall have paid under protest the whole or part of any tax shall, within a term of not to exceed thirty days from and after the date of payment, sue the Treasurer of Porto Rico in a court of competent jurisdiction, to secure the return of the amount protested, and summons shall be served on the Treasurer of Porto Rico and the Attorney General within thirty days after the time of filing such suit. If the said summons be not effected within the aforesaid term of sixty days the plaintiff's suit shall be held to be dismissed and the court shall render judgment of dismissal with prejudice as between the parties. The Attorney General, or a person designated by him, shall represent the Treasurer of Porto Rico in such suits. When any case is ready for trial the court shall set a day for the trial thereof without waiting for the parties to ask for it.

"When final decision is rendered, if favorable to the taxpayer, the Treasurer of Porto Rico shall proceed to return to him the amount directed in the decision, to be charged against the fund 'Taxes Paid Under Protest—Trust Fund,' referred to in section 3 hereof, plus interest on such account, at the rate of six (6) per cent a year, to be computed from [fol. 118] the date on which payment under protest was

made to the date on which actual return is made by the Treasurer to the taxpayer of the amount directed by the court to be returned.

"If the decision be favorable to The People of Porto Rico, the Treasurer shall cover from the fund known as 'Taxes Paid Under Protest--Trust Fund,' into the proper fund, the tax directed by the court in its decision, turning over to the respective municipality the proportion established by law in cases of property taxes."

I believe that this law covers the payment of all taxes and that the same applies to all parts of the Internal Revenue Law of 1925.

The law for the payment of taxes under protest was amended by the 1925 Legislature to cure the defects pointed out in the case of *West India Oil Company v. Gallardo*, by the Circuit Court of Appeals in their decision.

The new act seems clear and unambiguous, and is expressly devoted to the payment of taxes under protest, and I believe it provides a plain and adequate remedy at law.

Complainants claim that this law is void because both "Excise" and "Sales" taxes on sales of imports by importers in original packages are an unlawful burden upon foreign and interstate commerce.

The evidence in this case is that the complainants import cement from Denmark which is sold by them in the original barrels in which it is received, and matches from Santo Domingo which are sold by them in the original cartons in which they are imported. Both the cement and matches are received by the complainants at the dock in San Juan, Porto Rico, as their property, taken by them to their store and warehouse, and mingled with their other property and becomes a part of the stock with which they do business.

When the cement and matches are received by the complainants at the dock and taken by them to their warehouse as their property, the same is at rest and becomes part of their stock in trade.

[fol. 119] I am satisfied that this law is not a burden upon, or even a regulation of, foreign or interstate commerce.

The law as laid down by the United States Supreme Court in *Sonneborn Bros. v. Cretton*, Attorney General, 262 U. S. 506, is applicable to this case.

In this decision the Supreme Court by Chief Justice Taft, page 508, say:

"The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to their waterrooms or warehouse in Texas, there held for sales in Texas in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas.

Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither! The oil had come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the State. The interstate transportation was at an end and whether in the original packages or not, a state tax upon the oil as property or upon its sale in the State, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil has been the subject."

The next contention of the complainants is that the "Sales Tax" law as construed and enforced by defendant discriminates unlawfully against non-domestic manufacturers and products and the *ad valorem* "Excise" on products that are produced or manufactured in Porto Rico as well as imported from the continental United States, likewise discriminated unlawfully against the non-domestic product or manufacture, and that said Act is void for repugnancy to the Constitution of the United States and the uniformity clause of the Organic Act.

[fol. 120] This is a tax upon articles imported into Porto Rico as well as upon articles produced and manufactured in Porto Rico. The sales tax rate in both instances is two per cent. The defendant Treasurer construes this as imposing the tax upon the first sale of each article in Porto Rico. The complainants insist that this works a discrimination in favor of articles manufactured in Porto Rico,

That the tax on articles, manufacturer's or producer's sale price, while on imported articles the tax is fixed upon the importer's sale price, and that in case of imported articles that the taxable value of the articles include two elements of value not included in articles produced or manufactured in Porto Rico, namely, the cost of transportation and the importer's profit.

So far as discrimination between articles is concerned, the shifting and changing rise and fall in popularity and public favor will always change the price of articles, and hence the difference in amount of sales tax levied upon the selling price. Where the rate is uniform, as I think it is in this law, I cannot see how these factors can be claimed as an illegal discrimination. The uniformity required in taxes is the uniformity of application to a class under consideration, and not uniformity in final result. A tax act is not unconstitutional because of inequality in operation, owing to different local conditions. *Flint v. Stone Tracy Co.*, 200 U. S. 107.

In an opinion handed down by the Supreme Court of the United States on April 13, 1925, in the case of *Stebbins v. Riley*, Vol. 268, Supreme Court Reports, 137, in considering the California Inheritance Tax Law of 1917, Mr. Justice Stone who handed down the opinion of the court says:

"The guaranter of the Fourteenth Amendment of the equal protection of the laws is not a guarantee of equality of operation or application of state legislation upon all citizens of a State. As was said in *Magoun v. Illinois Trust & Savings Bank*, *supra*, at page 293:

"It only prescribes that that law have the attribute of equality of operation and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. . . . In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. *Id.* page 142."

There is no tax upon the article itself but only upon the privilege of doing certain acts. So far as the excise tax is concerned, I think that the Circuit Court of Appeals

in the case of the *West India Oil Company v. Gallardo* have settled this question. In this case the court held that the 1923 law, which is of exactly the same nature as the excise part of the law in question in this case, except as to the rates, was an excise tax and not a property tax. In the *West India Oil Company v. Gallardo* case the Circuit Court of Appeals says:

"We think it plain that this is an excise tax on sale or use, and not an import tax. On analysis, the sole basis for the appellant's elaborate argument is found in the fact that most articles of personal property subjected to this tax are in Porto Rico importations; because Porto Rico is in the main an agriculture or raw material producing country with few manufactures. But this economic fact does not affect the legal nature of the tax. It could not be seriously contended that states of the United States in which motor vehicles are not manufactured cannot levy a similar tax on sale or use without coming into conflict with the prohibition of import taxes found in article I, sec. 10, of the Constitution. Compare *Woodruff v. Parham*, 8 Wall. 123; *Machine Co. v. Gage*, 100 U. S. 676; *Brown v. Houston*, 114 U. S. 500; *American Steel & Wire Co. v. Speed*, 192 U. S. 500. Porto Rico has in this regard a like power to tax.

"Equally untenable is the contention that this is a tax on property and void for lack of uniformity. The tax is upon automobiles 'manufactured, sold or used in Porto Rico.' It is not a tax upon ownership as distinguished from the production, sale or use. See the language of Chief [fol. 122] Justice White in *Billings v. United States*, 232 U. S. 261, 280. Compare also *Brown Forman Co. v. Kentucky*, 217 U. S. 563.

"A minor contention is that the tax is void because of failure to provide for an adequate hearing as to the value of cost, to which there is or may be a 10 per cent addition. We infer that it was to meet a possible objection of this sort that section 6 was amended by Act No. 1 of the Special Session of 1923, so as to provide that *ad valorem* shall 'mean the cost plus a reasonable benefit to be estimated at 10 per cent over the amount of said cost unless (the tax payer) proves to the satisfaction of the treasurer that the profit obtained is less than said 10 per cent.'"

The complainants claim irreparable damage and destruction of business. I cannot see that any such showing has been made by them. It is true that if complainants have to pay the tax and cannot collect it all from their customers, the tax would decrease their profits. However, this is no reason whatever why the law is invalid. I have found through a long experience as a consumer that the consumer is the one who finally pays the taxes and if the manufacturer, wholesaler and retailer do not charge the tax to the consumer directly, it is always done indirectly, and that the consumer ultimately pays all taxes upon the articles he buys, and so it will be under this law. This court cannot pass upon the question as to whether the taxes are so high that the dealer cannot make his usual profits. The fact remains that the expenses of Government must be paid. If the expenses are too high the tax payer should devote his efforts to having them reduced, but the expenses of Government must be paid and the tax payer is the one who eventually has to pay them.

High taxes naturally reduce profits and probably in many cases make profit impossible, yet when they are necessary to pay the expenses of government they must be paid in one form or another. A sales tax bears on all equally and each must bear his just proportion, according to the amount he buys. This court does not believe that the complainants will pay this tax and not collect it in one form or another from their customers, and it will probably be done in the [fol. 123] same manner as they collect their freight and transportation charges. However you figure it, the consumer is the one who eventually pays all taxes upon the articles he buys. If the complainants in this case cannot obtain a fair profit upon the articles taxed under this law, it is by reason of competition or other causes over which the Government has no control and not by reason of the tax imposed by the law.

The next reason assigned by the complainants as to the validity of the law is that the exemptions contained in Section 83 are clearly arbitrary and discriminatory. Section 83 reads as follows:

"Any person comprised within the provisions of section 62 of this Act, except manufacturers whose total monthly

sales do not exceed one hundred (100) dollars, shall be exempt from the payment of the tax specified in said section; Provided, That when one person alone shall have several businesses, under separate accounts, the amounts of the monthly sales of these should together amount to less than one hundred (100) dollars so as to be comprised within the exemption hereby established; Provided, further, that the tax provided by section 62 of this Act shall not attach to (1) food stuffs; (2) fluid gas; (3) electric current; (4) fertilizers, as well as all raw materials used in the manufacture of fertilizers; (5) charcoal and wood; (6) jewels and precious and semi precious stones; (7) the sales made by agriculturists of their crops and live stock; (8) the sale of newspapers, to newspaper advertisements and literary, scientific and philosophical works and to public school text books."

A reasonable classification and exemptions has always been held to be within the powers of the legislature. Exemptions are valid as long as they are reasonable, and the amount of such exemptions is largely within the discretion of the legislature. This proposition requires no citation of authorities. Every conceivable question relating to exemption and classification were raised in regard to the United States Income Tax Law, and it was held good. The reasoning which applies there applies here.

[fol. 124] On the general subject of equality and uniformity in taxation and on exemption from taxation I copy part of the opinion in the case of *Bell's Cap R'd Co. v. Pennsylvania*, 134 U. S. page 237, which I think correctly states the law as applied to this case:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and per-

sonal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulation, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

It is probable that the remedy of injunction has some time been awarded with too little regard to any other consequences than those which concern the individual applying for it. But the personal consequences are not the only ones which should be kept in view in this case. When the illegalities complained of affect only the persons complaining, an injunction which restrains proceedings as to him may cause no considerable mischief, and may very properly be awarded if a sufficient case is made out; but when they affect the whole tax levy, as in this case, a court should be extremely cautious in awarding a process which will reach the cases of others not complaining, and which would seriously embarrass all the operations of Government depending on the source of revenue which by means of it would be

stopped. Courts have frequently remarked upon the impossibility of the Government's calculating with any certainty upon its revenues if the collection of taxes is subject to be arrested in every instance in which a taxpayer could make out a technical case for arresting the collection of the tax, and it is justly said that it is much better to let the individual pay to the Government the demands it makes upon him, and, if he considers them wholly or in part illegal, apply for the refunding of the money with interest afterwards.

Courts do not look with favor upon suits to enjoin the collection of taxes and an injunction will only be issued in a plain case.

All presumptions are in favor of the tax proceedings and the burden is on the one attacking the tax. Except under very special circumstances the power of taxation (which includes the collection as well as the assessing of taxes) ought not be interfered with by injunction, and I do not think that this is one of those cases.

Courts cannot pass upon the question of the policy of a tax law, or the expediency of the exercising of the taxing power, or the wisdom or fairness of the mode of distributing the burden of taxation, when no provisions of the Constitution are violated, and I do not believe they have been in this case.

I find that there is a lack of equity shown in this case in that the complainants have and are acting in an inequitable manner in regard to these taxes. That the complainants have an adequate remedy at law and that they have failed to show any irreparable loss or damage. That the taxes complained of are valid and legal in every respect. The petition for an injunction is therefore denied and the bill dismissed at the costs of the complainants and a decree will be entered in accordance with this opinion.

Dated at San Juan, Porto Rico, this eighth day of January, 1926.

Ira K. Wells, Judge.

## IN UNITED STATES DISTRICT COURT

ORDER—January 16, 1926

In this case I am satisfied that the opinion rendered by this court is correct. I am satisfied that the plaintiff has no equity; that he has a plain and adequate remedy at law, and that he has not suffered any irreparable loss or injury, and that the law is constitutional, and that the plaintiff should pay the taxes. Nevertheless, I realize that the plaintiff has a right to differ with the court, and to take an appeal, and that the Circuit Court of Appeals have a right to hear this matter and decide it in accordance with justice and the facts. Although I am confident that the opinion of this court is right and supported by the law and the evidence, yet I have no desire to place the plaintiffs or the Court of Appeals in such a position where, if they differ from this court, they could not grant such relief as the facts and the law justify. It seems to me that it is proper that the Court of Appeals should pass upon this question of supersedeas bond, and while I would not grant a supersedeas bond, and do not believe one should be granted, as these suits affect the entire tax levy and it is very important to the people of the island that the Government of Porto Rico should receive its taxes with which to operate the Government, yet as the Circuit Court of Appeals must pass [fols. 127 & 128] upon the legality of this law and upon the correctness or incorrectness of the opinion rendered by this court, I believe that in justice and equity they should also pass upon the question of granting a supersedeas bond, and I am going to amend the decrees in the forty (40) cases decided and grant a stay of thirty (30) days. The order will be made in each of these cases, and the time will not be extended in my case to anybody.

It is further ordered that the plaintiff, within five (5) days from this date, will pay into this court the taxes that are now due and owing the People of Porto Rico under the law in question, and the taxes in the future within five (5) days after they become due, and that such money abide the orders of this court. Failure to so deposit said taxes with the clerk of this court shall be a waiver to any stay granted by this order, and to all rights hereunto.

Done and ordered in open court, at San Juan, Porto Rico, this sixteenth day of January, A. D. 1926.

Ira K. Wells, Judge.

[fol. 129] IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY—November 10, 1925

This case comes on to be heard upon its merits. Cay. Coll y Cuchi, Esq., appeared in behalf of the complainant, and J. A. Lopez Acosta, Assistant Attorney General of Porto Rico, appeared for the defendant. Thereupon the court heard testimony of witnesses in behalf of the complainant. Defendant introduced no testimony and the case was taken under advisement, parties to file briefs in five days.

IN UNITED STATES DISTRICT COURT

FINAL DECREE—January 18, 1926

This cause came on to be heard for final hearing at this term on the tenth day of November, A. D. 1925, all parties by counsel; and the evidence being closed, the case was thereupon submitted to the court upon written briefs filed by the parties.

[fol. 130] And having considered the pleadings, the evidence and the briefs of counsel, the court finds that all the equities in this cause are with the defendant, Juan G. Gallardo, Treasurer of Porto Rico; that there is a lack of equity shown by complainants in this case and that complainants have been and are acting in an inequitable manner in regard to the taxes sought to be enjoined in their bill of complaint herein; that complainants have an adequate remedy at law as to the matters complained of and that they have failed to show any irreparable loss or damage. The court further finds that the taxes, as demanded of complainants by defendant, and which are complained of in the bill of complaint herein, are valid and legal in every respect.

It is therefore ordered, adjudged and decreed that the petition for injunction in this cause to restrain the defendant, Juan G. Gallardo, Treasurer of Porto Rico, from assessing and collecting from complainants the taxes provided under Act No. 85 of the Legislature of Porto Rico, approved August 20, 1925, be and the same is hereby denied; and that the bill of complaint be herewith dismissed. It is further ordered, adjudged and decreed that the complainants pay all costs herein.

Done in open court at San Juan, Porto Rico, this eighteenth day of January, 1926.

Ira K. Wells, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL.—Filed January 20, 1926

The petition of the complainant respectfully represents:

That petitioner is aggrieved by the judgment and final decree herein rendered on January 18, 1926, denying the petition for injunction and dismissing the bill of complaint in this case; and that petitioner, for the reasons specified in the assignment of errors filed herewith, desires to appeal and does hereby appeal from said decree, and desires that said appeal be returnable to the Circuit Court of Appeals for the First Circuit.

Wherefore, the petitioner prays that the said appeal be [fol. 131] allowed, returnable to the United States Circuit Court of Appeals for the First Circuit, according to law, and that a transcript of the record, proceedings, papers and exhibits upon which the said decree was rendered, duly authenticated, be sent to the said Circuit Court of Appeals for the First Circuit; and petitioner prays for all general and equitable relief. And your petitioner further prays that the proper order touching the security to be required of them be made to perfect their appeal.

San Juan, Porto Rico, January 20, 1926.

Cay, Coll y Cuchi and Cruzado Silva, by Gust. Cruzado Silva, Solicitors for Complainants.

## IN UNITED STATES DISTRICT COURT

## ORDER ALLOWING APPEAL—Filed January 20, 1926

Considering the foregoing petition this day presented, it is ordered that an appeal be allowed to the petitioner and complainant in this suit from the final decree of January 18, 1926, rendered against said complainant in the above-entitled and numbered case upon the giving of a bond for costs in the sum of \$300, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the First Circuit, and no provision for a supersedeas bond is made in this order for the reasons stated in the order of this court of January 16, 1926, amending the decree of January 8, 1926, whereby a stay of thirty days is given until the Court of Appeals should pass upon the question of the supersedeas bond which has been denied by this court.

San Juan, Porto Rico, this twentieth day of January, 1926.

Ira K. Wells, District Judge.

## [fol. 132] IN UNITED STATES DISTRICT COURT

## ASSIGNMENTS OF ERROR—Filed January 20, 1926

Now, on the twentieth day of January, 1926, came the said complainant, by Cay. Coll y Cuchi, its solicitor, and says that the final decree in said cause is erroneous and against the just rights of the said complainant for the following reasons:

1. Because Act No. 85 of the Legislature of Porto Rico approved on August 20, 1925, is null and void because it constitutes double taxation, inasmuch as in accordance with the General Tax Law or Political Code of Porto Rico the said property, at the same time and under the same condition, has been taxed with a previous tax *ad valorem*, and with a previous tax upon the occupation or business of the complainant.

2. Because the said law is in open violation and contradiction of the laws of Congress of the United States, and

specially of the Act of Congress of the United States approved on April 12, 1900, and in violation of Section 53 of another Act of Congress of the United States, approved March 2, 1917.

3. Because the proceeds to make said tax effective are inquisitorial in their nature and really provide for the confiscation of the property of the complainant without due process of law.

4. Because Act No. 9, approved by the Legislative Assembly of Porto Rico on June 23, 1924, providing for payment of taxes under protest, is not applicable to excise duty by the very nature of this tax, and because it would be impossible to make payments under protest for every automobile or parts of automobiles sold and then file a suit in the court of law for the recovery of the tax paid.

5. Because the said tax is against the Organic Act of Porto Rico and the Constitution of the United States requiring uniformity of taxation.

Cay, Coll y Cuchi and Cruzado Silva, by Gust. Cruzado Silva, Solicitors for Complainants.

[fol. 133] IN UNITED STATES DISTRICT COURT

NOTICE OF FILING OF STATEMENT OF FACTS—Filed January 25, 1926

To the Attorney General of Porto Rico and to Honorable J. A. Lopez Acosta, Counsel for the Defendant, San Juan, Porto Rico:

Please take notice that the statement of facts in the above-entitled case, copy of which is annexed hereto, will be filed on the twenty first day of January, 1926.

San Juan, Porto Rico, January 25, 1926.

Coll y Cuchi and Cruzado Silva, by Gust. Cruzado Silva, Solicitors for Complainant.

Copy of the foregoing statement of facts duly acknowledged and the same being a true and correct statement of

the evidence therein contained and presented in this case, the same is hereby approved.

San Juan, P. R., January 25, 1926.

George C. Butte, by J. A. Lopez Acosta, Counsel for the Defendant.

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IN UNITED STATES DISTRICT COURT

**Statement of Facts**

Be it remembered that this cause came on for hearing before the Honorable Ira K. Wells, judge of the District Court of the United States for Porto Rico, on the tenth day of November, in the year nineteen hundred and twenty-five, the complainant, Insular Motor Corporation, being represented by Cayetano Coll Cuchi, Esq., and the defendant, Juan G. Gallardo, Treasurer of Porto Rico, by J. A. Lopez Acosta, Esq., assistant attorney general of Porto Rico.

Whereupon FRANK L. MITCHELL, a witness called by the plaintiff, having been duly sworn, testified as follows:

[fol. 134] That his name is Frank L. Mitchell; that he lives in Pueblo Viejo, which is situated within this district; that he is engaged in the automobile business, working with the Insular Motor Corporation, which is the complainant in this case; that outside of the sale of automobiles, the Insular Motor Corporation is connected with the sale of automobile supplies; that the Insular Motor Corporation deals in automobiles and automobile supplies; that said corporation sells Buick, Chevrolet, Oldsmobile, Oakland and G. M. C. trucks; that all these cars are manufactured in the United States in the State of Michigan; that they order these cars through the General Motors Export Corporation of New York, which is a subsidiary of the General Motors Corporation of the State of New York.

Being asked by the attorney to explain to the court the way in which they made one complete order and how they received said order in Porto Rico, the witness testified: That they cable asking for the cars to be shipped as soon as possible, and they come in on a bill of lading through the New York and Porto Rico line or the Bull line; that they

cable the order under a contract; that in said contract they appear as exclusive agents in Porto Rico, for they are the distributors in Porto Rico of the General Motors Export Company.

Being asked by the attorney if the Government or any agent of the Government had made any inquiries or effort to collect any tax of any kind upon the cars brought by them into Porto Rico, the witness answered in the affirmative.

Then the attorney commands the witness to take one single instance and explain the process whereupon the Government had tried to impose or assess the tax under this new law, and the witness testified that here is an instance. The attorney then advised the witness to go slowly and describe the whole process with the papers he had there, in one single instance, to which the witness testified: That the government inspectors came to their place of business with three copies of this document here.

Mr. Coll: I would like to have this document marked for identification.

[fol. 135] The Court: It may be marked.

[Document marked "Identification No. 1, Plaintiff."]

The witness continued, testifying that the government inspectors bring the information contained in that paper, saying that there have arrived on the steamship Edith, voyage No. 100, to San Juan, Porto Rico, on the twenty fifth of September, consignment to the Insular Motor Corporation of San Juan, under bill of lading No. 75, shipped by the General Motors Export Corporation, ten (10) boxes of motor cars; that the government inspectors ask them to produce a facturas, that is invoice, covering those cars, which the corporation do produce usually if it has that; that sometimes the said government inspectors ask for said facturas or invoices when they have not arrived; that this invoice covers on one sheet ten (10) Chevrolet cars marked with the same markings as shown on the document to show the cost of the cars to the complainant corporation plus any extras, that is, low pressure tires, etc.

That then on these blue sheets is included the extra for boxing for export and for inland freight on these ten (10) cars, and on the other sheet is shown ocean freight from

New York to San Juan, the marine insurance and the landing charges; that, in fact, the total cost, landed, on the car in Porto Rico; that now then, these Government men total up those three sheets, add ten (10) per cent to that.

That said inspectors tell them that it is for our supposed profit in the sale; that from said cost plus ten (10) per cent the said inspectors calculate seven (7) per cent as a tax assessed on that shipment of cars; then they fill it out down below here and the inspector signs it; that he means to say that the inspectors calculated it, in this case, and then fill the document on the space down below it, right on their paper, that is, their calculation of tax of \$406.32 on this shipment.

That when the government inspectors do this, they do not examine the merchandise received by the corporation, and that the corporation does not handle the merchandise in any way; that in this particular case to which the witness [fol. 136] has referred, the cars were on the dock at the time of the assessment of the tax; being asked by the attorney to state in about what percentage of cases, more or less, is the tax assessed on the dock before it comes into the hands of the corporation, the witness answers that it is rather difficult for him to say, because up to date he has not kept an accurate record of the times; that the government agents make the assessment when they find that the corporation have received the invoice, but not when the corporation have received the cars; that he is not able to tell how much taxes have been assessed in the way that he has just explained, from the 20th of August up to date, but that the amount assessed by the government agents in the way just explained by him, from the 20th of August to the 31st of October, is \$2,397.42.

Whereupon the following proceedings took place:

The Court: Under this excise tax law?

Witness: Yes.

Mr. Coll: Now, if your Honor please, I want to introduce this in evidence.

Mr. Lopez: If your Honor please, I have *no* objection to the admission of the document if it is not offered in an

attempt to prove that these amounts were assessed, because they were not assessed.

Mr. Coll: That is a matter of law. The document will speak for itself and then we will argue that question.

Mr. Lopez: Then we have no objection, your Honor.

The Court: It may be admitted and marked by the reporter.

[Documents marked "Exhibit A 1" to "A 5," inclusive, plaintiff.]

#### Cross examination by Mr. Lopez Acosta:

Then the witness continued testifying: that he stated that he worked for the Insular Motor Corporation; that the Insular Motor Corporation is a corporation of Porto Rico, independent of the General Motors; that the only relation existing between the Insular Motor Corporation and the General Motors is that the Insular Motor Corporation is under contract with said General Motors, but distribute their products in Porto Rico; that he thinks this [fol. 137] is the only connection existing between the Insular Motor Corporation and the General Motors; that the General Motors does not own any stock in the Insular Motor Corporation; being asked if when the Insular Motor Corporation buys the cars in New York, if they do so for their own property for their own business or if they act only as an agent of the General Motors, and the witness answered that that depends a little bit on the meaning of the word "buy"; that he means in this sense: they ask the General Motors to ship cars to them and they do so; that the General Motors ship to them on 120 day documents against acceptances, trade paper, and that they do not pay for these cars until the cars have been sold and delivered; that he is not capable of saying whether the car is bought in New York or where it is bought; that he does not know who are owners of these cars when they received them on the dock in Porto Rico; being asked by the attorney of the books of the corporation show who is the owner of the cars when they are landed in Porto Rico, the witness replies that they take them into their hands and when the documents are presented to them at the bank, then they accept them on 120 days payment; that the books of the corpora-

tion show that the cars are in their possession; that he does not know who is the owner of the cars; that he has been two and a half years approximately with the Insular Motor Corporation.

Whereupon the following proceedings took place:

Mr. Lopez: May it please your Honor, I am going to get a record in the other case whether this witness testified that the cars were their own property.

Mr. Coll: Now, if you Honor please, in the way that the question is asked it is calling for a legal conclusion, and the witness, who is an intelligent witness, in the way it has been put now to him has declined to make a legal statement, that is to conclude whether the property is his or the property of the General Motors under the conditions in which the sale is made. He does not know as a legal proposition whether the cars are his or not.

The Court: He has a right to cross examine.

Mr. Coll: Yes, your Honor, I know, but the witness has [fol. 138] stated how the transaction has been made. If that shows ownership by the Insular Motor Corporation, why, all right; if not, all right.

The Court: If a person has a horse, he knows if it is his or not.

Mr. Coll: There are times when he is mistaken.

The Court: Proceed with the cross examination.

Then the witness continued testifying that when the Insular Motor Corporation buy or receive on the dock said cars, from New York, they unbox them and take them to the warehouse of the Insular Motor Corporation; that usually they tow them up with another car; that they tow them up with the same material they receive them; that the car comes in a box with the wheels off; that they do not tow them in the box, but on four wheels; that in order to get them out of the box, they hire a man to remove the box from around the car; that they open the box, put the wheels on them and do various other things, such as putting on the wind shields, for the car comes pretty well knocked down; that if he were going to enumerate the entire process, it will take some time.

That it takes a couple of mechanics a couple of hours to prepare the car to take it off the dock; that somewhat they

have to assemble the car to take it off the dock; that he spoke of a contract existing between the Insular Motor Corporation and the General Motors; that said contract is not in his possession, but in their office at stop 21; that he did not bring said contract with him because nobody asked him for it.

Being asked what are the conditions of that contract, the witness replies that it is better to get the contract because he could not attempt to quote a contract that he has not seen in the past two or three months; that he knows the conditions of that contract and can testify that they are only distributors in Porto Rico, because he knows that the contract contains those general facts; that he has read said contract a number of times.

That he cannot recall exactly the number of cars they have to sell in Porto Rico in order to comply with that contract, but they have to sell according to certain terms of the contract more than 100 Chevrolets and 100 Buicks per year; that he has forgotten the exact number, but that [fol. 139] it is very easy to get the contract if the attorney likes; that when making the contracts with the buyers here they make them in the name of the Insular Motor; that they make sales contracts as though the Insular Motor Corporation was the owner of the cars.

Being asked if they are practically the owners of the cars the witness testifies that he does not know, but he believes they are; that he has been in this business for about two and a half years; that he has not been connected with the automobile business besides his connection with the Insular Motor Corporation; that he is the assistant manager and treasurer of the Insular Motor Corporation; that as said assistant manager and treasurer of the Insular Motor Corporation he is pretty well acquainted with the form of negotiations of said corporation; that technically he knows if a car belongs to the corporation when they receive it, but not legally; that he believes they are the owners of the cars when they receive them, but he does not know. Then the attorney asks the witness the following question: Are you or are you not in your business the agent of the General Motors Corporation?

Whereupon, the following proceedings took place:

Mr. Coll: If your Honor please, that is calling for a legal conclusion. Now, the Government may ask this witness how transactions are done and from the way in which the transactions are done then the court will say if they are the agent or not or what they are. I might believe myself to be an agent and I might not be an agent, if not legally an agent. I am willing to produce the contract and that will show.

Mr. Lopez: I do not wish to sit here all afternoon wasting the time of the court to show in a roundabout way what we are trying to prove. The witness is intelligent, and he has testified before that they are doing their own business. I do not see why this witness has to elude the question and not come out with the truth.

Mr. Coll: I do not believe my brother is fair, your Honor, about making that statement about the witness. The witness has testified that the Insular Motor Corporation [fol. 140] orders cars; that they are shipped on a draft of 120 days. Now, if your Honor please, if I were put under oath and were asked whether they are agents of the General Motors or not, I myself would not be prepared to swear to that, because there are a lot of possibilities with a contract of distribution and on that account may be construed as an agency contract.

The Court: If he does not know he may say so.

Mr. Coll: He has said that, your Honor. He has said that he is willing to produce the contract but that he is not willing to say whether in the contract they are agents or subsidiaries or what. He does not know.

The Court: He may answer the question.

Then the witness continued testifying that he believes the Insular Motor Corporation has been in business in Porto Rico since either March or April, 1923; that they, the present owners of the Insular Motor, took charge of it on July 1, 1923; that they order their cars from the General Motors Export Corporation of New York City; that the concern of the General Motors in New York City is a subsidiary of the General Motors Corporation.

That they have the contract with the General Motors Export Corporation; that the Chevrolet Motor Company

manufactures the Chevrolet, the Buick Motor Corporation of Flint, Michigan, manufactures the Buick, the Olds Motor Company manufactures the Oldsmobile, the General Motor Truck Company manufactures the G. M. C. truck, and the Oakland Motor Company, he believes, is the name of the manufacturer of the Oakland car.

That when they order their cars they send a cable from here to the States, directed to the General Motors Export Corporation; that the contents of said cable usually reads as follows: "Please place our firm orders for so many cars for immediate delivery or for January delivery, or whatever it may be, and sign it IMCO"; that they have an open account with the General Motors Export Corporation; that he does not know the amount of their credit with this firm, but that on their cars they have had as high as \$75,000, he believes; that he does not know if there is a limit on it or not, for he does not remember; that he is inclined to think [fol. 141] that, in accordance with the recent arrangement made with the General Motors Export Corporation, their account with said corporation is not limited; that he does not believe so, but he is not positive of that; being asked by the attorney if, when they cable for cars from the General Motors Export Corporation and the cars are sent, they are charged to the account of the Insular Motor Corporation as credits, or are sent to be paid on delivery, the witness testified that documents are sent to the Nova Scotia Bank, with the shipping documents and the draft and copies of the invoice; that they pay to the Nova Scotia Bank when the goods are sold, for such is their present arrangement; that they have had the present arrangement for some time in August of this year; then the attorney asked if that was about two months ago, and the witness replies that he thinks it was in August when Mr. Hitchman was north; that he cannot remember the date; then the attorney asks if he can remember if it was after or before the new law went into effect, and the witness testifies; that as he recalls it, he should say that it was about the same time that Mr. Hitchman went north on the 5th of August, and it was while Mr. Hitchman was north that this new arrangement was made.

That if they make a loss on the sale of a car to a customer here in Porto Rico, said loss is charged to the Insular Mo-

tor; that they do not get a commission from the General Motors Export Corporation, but they are entitled to a discount from their factory price as dealers; that they do not get a commission for each sale; that if they make any profit from the sales of the cars in Porto Rico, the General Motors Export Corporation does not share in that profit, neither do they share in the loss, if they have any; that he does not know if they have to make a monthly or annual report to the General Motors of the business and transactions done by the Insular Motor Corporation in the automobile business in Porto Rico, but they used to do so.

That the General Motors Export Corporation has never audited their accounts here; that the General Motors Export Corporation ship to them on 120 days' time, but if the cars are not sold at the expiration of that time, the Insular [fol. 142] Motor Corporation has the right and may ask for an extension of another 120 days, and that so far as the witness knows, that is indefinite; that they have never returned cars to the General Motors Corporation after not being able to sell them; that he does not know if they have to return them, but they have never done so; referring to Exhibit A for plaintiff, the attorney asks if the agents of the Government bring three copies of this Exhibit A to the Insular Motor Corporation to find out if they have or have not received those cars, to which the witness replies that said agents ask if they have the facturas or invoices, for that is what they ask and seem to be interested in.

That when the government agents find that the Insular Motor Corporation has the factura, they take these three invoices (referring to Exhibit A for plaintiff); that those three invoices are copies of the invoices of the goods for which the General Motors Export Corporation has or will draw on the Insular Motor Corporation for these ten (10) Chevrolets; that by saying "Draw on us" the witness means that the General Motors draw at 120 days with documents, commercial papers, attached to the draft.

That the General Motors draw against the Insular Motor Corporation when they send the goods; that up to date they have met those drafts at the bank; that although the cars have not been sold, they used to meet those drafts in time; then the witness is asked to explain the transaction, and he continues testifying.

That in this particular case, invoice No. C 79388 is the invoice for the ten (10) Chevrolet cars at the factory including extra charges for top boot, bow clamps and low pressure tires; that in the case for the ten (10) cars the amount is \$4,149 even; to that sum they added the amount shown on factura No. C 79389 which is \$740, covering export boxing and inland freight on the same ten (10) cars; to that they then added the amount in this case of \$387.94 shown on factura No. C 79390; this \$387.94 is made up of ocean freight from New York to San Juan, the marine insurance, landing charges, etc.; now then, just a moment—that total is shown on this white sheet here, to which the government inspectors add the ten (10) per cent and on that sum plus the ten (10) per cent he then takes seven (7) per cent which [fol. 143] is afterwards filled in on the pink sheet where it says "I have made the investigation ordered and as a result of the same have the honor to report the following tax, \$406.32."

That then the government inspectors figure the cost to the Insular Motor Corporation of the automobile, plus the ten (10) per cent; that on the total they are charged with a seven (7) per cent tax; then the attorney asks the witness if when the agents of the Government write on Exhibit A for plaintiff those figures which he just mentioned, \$406.32, they are requested to pay the tax at that moment or if they wait till the corporation sells the cars to collect the tax, to which the witness answers that said inspectors have not requested them as yet, to his knowledge.

That they not requested him to make the payment; that to his knowledge the agents of the Government have not requested the payment of the tax since August 20, 1925; that he does not know if the government agents have requested the payment of taxes before the articles are sold; that the tax which they are obliged to pay to the Government for this excise from August 20, 1925, until October 31, 1925, amounts to \$9,397.42; that this amount refers to cars already sold.

That these cars sold have been turned over to their customers; that the Insular Motor Corporation does not ship the cars from the States to Porto Rico, but they are shipped to it; that he means to say that they receive said cars, same being shipped to them from the States.

And then the complainants rested their case.

## IN UNITED STATES DISTRICT COURT

## JUDGE'S CERTIFICATE TO STATEMENT OF FACTS

The complainant appellant, Insular Motor Corporation, tender and present the foregoing as its statement of the evidence in this case, and prays that the same be approved by the court and made a part of the record, and the same is accordingly done this — day of January, 1926.

The foregoing contains all the evidence, excepting exhibits, in the case in the narrative form, and where the testimony herein is set forth in the form of question and answer, it is so set forth that the evidence might be clearly understood.

San Juan, Porto Rico, this twenty fifth day of January, 1926.

Ira K. Wells, District Judge.

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Citation, in usual form, showing service on Juan G. Gallardo, omitted in printing.

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[fol. 145] IN UNITED STATES DISTRICT COURT

PRECED FOR TRANSCRIPT OF RECORD—Filed January 25, 1926

To the Clerk:

You are requested to take a transcript of the record to be filed in the United States Circuit Court of Appeals for the First Circuit, pursuant to an appeal allowed in the above entitled case, and to include in said transcript of the record the following and no other papers or exhibits, to wit:

Bill of complaint

Answer.

Rule to show cause.

General entry of trial.

Stipulation and agreement.

Opinion of the court of January 8, 1926.

Opinion in case No. 1313 of J. Ochoa & Hno. v. Juan G. Gallardo, Treasurer of Porto Rico.

Order of the court of January 16, 1926.

Final decree of January 19, 1926.

Petition for appeal.

Order allowing appeal.

Assignment of errors.

Statement of facts.

Citation on appeal.

Præcipe.

Respectfully, Coll y Cuchi and Cruzado Silva, by  
Gust. Cruzado Silva, Solicitors for Complainants.

Copy received San Juan, Porto Rico, January 22, 1926.  
J. A. Lopez Acosta, Attorney for Defendant.

---

[fol. 146] Bond on Appeal for \$300.00 approved; omitted  
in printing.

---

[fol. 147] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Antonio Aguayo, clerk of the District Court of the United States for Porto Rico, do hereby certify that on January 20, 1926, the complainant, The Insular Motor Corporation, deposited in the registry of this court the sum of twenty thousand six hundred and sixty eight and 95/100 dollars (\$20,668.95), as required by the order of this court of January 16, 1926.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at San Juan, in said District, this twenty sixth day of January, A. D. 1926, and in the 150th year of the Independence of the United States of America.

Antonio Aguayo, Clerk U. S. District Court for Porto Rico. (Seal.)

## IN UNITED STATES DISTRICT COURT

SUPPLEMENTARY PRACIPE FOR TRANSCRIPT OF RECORD—Filed  
January 26, 1926

To Antonio Aguayo, Esq., Clerk of the District Court of  
the United States for Porto Rico:

Please include in the transcript of the record in this case,  
in addition to the papers, pleadings and proceedings men-  
tioned in the pracipec filed herein, the following:

Certificate of the clerk of the court as to the sum paid  
into court by complainants, in conformity with decretal  
stay order.

Bond for cost on appeal.

San Juan, Porto Rico, this twenty-sixth day of January,  
1926.

Coll y Cuchi and Cruzado Silva, by Gust. Cruzado  
Silva, Solicitors for Complainants.

[fol. 148] Copy of the above supplemental pracipec for  
transcript is hereby acknowledged this twenty-sixth day  
of January, 1926.

J. A. Lopez Acosta, Solicitor for Defendant.

---

Clerk's certificate to foregoing transcript omitted in  
printing.

[fol. 149] IN UNITED STATES DISTRICT COURT

EXHIBIT A, PLAINTIFF, 1312 EQUITY—Filed Nov. 10, 1925

Address all official communications to the Treasurer of Porto Rico, San Juan.

Government of Porto Rico, Department of Finance, Bureau of Internal Revenue, San Juan, P. R.

#513.

Sept. 29, 1925.

To the Internal Revenue Agent, San Juan, P. R.

SIR: Since there are no records in this office showing that the taxes on the merchandise hereinafter described, have been paid please make an investigation in this matter and proceed in accordance with the provisions of the Internal Revenue Act now in force.

Shipment arrived on Steamer Edith, No. 100, in San Juan, Porto Rico, on the 25th day of September 1925, consigned to Insular Motor Co. of San Juan, P. R. under bill of lading #75 sent by the General Motors Co. and consists of 34131-9 28 10 Boxed motor cars.

Respectfully, ———, Treasurer, by P. J. Mascaro, Asst. Chief of the Bureau of Internal Revenue.

[fol. 150] Treasurer of Porto Rico, San Juan, Porto Rico.

SIR: I have made the investigation which you ordered, and as a result of same I have the honor to inform you as follows: Tax, \$406.32.

Respectfully, Jose Ramirez Colon, Internal Revenue Agent.

Certified to be a true and correct translation. Tomas Acosta Ramid, Official Translator United States District Court for Porto Rico.

## EXHIBIT A 2, PLAINTIFF, 1312

Draft No. 36024

Sept. 18, 1925.

Insular Motor Corp., San Juan, P. R.

120 dys. d. a.

Goods as per invoice of the General Motors Export Co.  
as follows:

C 79390	387 94	
88	4,149 00	
89	740 00	
	<hr/>	
	5,276 94	5,276 94
		527 69
		<hr/>
		5,804 62
		7
		<hr/>
		406.3241

Draft drawn for \$5,276.94 with interest at 6% per annum  
and all bank charges payable by the drawee. Tax 406.32.  
Accept. Sep. 25. Due Jan. 23.

SS. "Edith." B. L. 75.

Tax \$406.32. J. R. C.

10/5/25.

Filed Nov. 10, 1925, Clerk's Office, United States District  
Court.

A. Aguayo, Clerk of Court, by F. Robles, Dep. Clerk.

[fol. 151]

## EXHIBIT A-3, PLAINTIFF

General Motors Export Company, New York, N. Y.

## Debit Memorandum

Sept. 18th, 1925.

C79380.

Insular Motor Corporation San Juan, Porto Rico:

We debit your account with Shipping Expenses on shipment of Ten (10) Cases Automobiles per S. S. Edith Sig. Abt. 9 19 25 covered by our invoice No. C79388 89:

Ocean Freight, New York to San Juan, 2142'

@ .17 per C F	364 14
---------------	--------

Marien Insurance, \$6,070 00 at .17½ incl.

S. R. & C. C.	10 62
---------------	-------

War Risk Insurance, — at —

Counsel fees

Consular blanks

Landing charges, .01 per C F	21 42
------------------------------	-------

396 18

Less .03 per 100# on 27450#

8 24

387 94

Inc. Cert. O. C. 40295-A.

Our order No. XCOS 341319/328.

General Motors Export Company. M. M. R.

E. &amp; O. E.

Filed Nov. 10, 1925, Clerk's Office, United States District Court.

Antonio Aguayo, Clerk of Court, by F. Robles, Dep. Clerk.

## EXHIBIT A4, PLAINTIFF, 1312

Our Order No. XCOS 341319/328. S. S. "Edith."

B. O. Order No. —.

In referring to this please mention our Invoice No. C79388.

Distributor's Order No. Cable #99 6/30 & Co. #157 6/30.

R. R. Car No. N. Y. C.—#498,103.

[fol. 152] Factory Invoice No. A-19451.

Date Dispatch: September 5, 1925.

General Motors Export Company, New York, N. Y.

September 16, 1925.

Sold to Insular Motor Corporation, San Juan, Porto Rico.

Mark: I. M. C. O. San Juan 157. Made in U. S. A.

Terms: General Motors Corporation Acceptance F. O. B. Flint, Michigan.

Box number	Dimension each case, 153 x 59 x 41"	Gross weight each.		Net weight each.	
		2,745 ½		1,875 ½	
341319	Frame #2K-53611	Eng. #1889143			
341320	Frame #2K-53612	Eng. #1888378			
341321	Frame #2K-53610	Eng. #1888378			
341322	Frame #2K-53608	Eng. #1889178			
341323	Frame #2K-53615	Eng. #1888504			
341324	Frame #2K-53616	Eng. #1899464			
341325	Frame #2K-53609	Eng. #1891118			
341326	Frame #2K-53617	Eng. #1894280			
341327	Frame #K-53614	Eng. #1889451			
341328	Frame #2K-53613	Eng. #1888451			
	Kilos		Kilos		
	1,244 86		850 32		

Description

10 Chevrolet Superior Model "K"

Touring Cars, 5 Passenger, 4 Cylinder, Regular Model, Miles Speed-

meter, Body Color Chevrolet Gray \$399 00

Net Extra Top Boot & Bow Clamps 2 35

Low Pressure Tires 13 55

\$414 90 \$4,149 00

[fol. 153] Note.—Spanish Instruction Book included.

E. & O. E.

General Motors Export Company. E. P.

Filed Nov. 10, 1925, Clerk's Office, United States District Court.

Antonio Aguayo, Clerk of Court, by F. Robles, Dep. Clerk.

EXHIBIT A-5, PLAINTIFF, 1312

General Motors Export Company

Charge Memorandum

Reference: XCOS 341319-328. No. C-79389.

New York, N. Y., September 16, 1925.

Insular Motor Corporation, San Juan, Porto Rico:

Terms: General Motors Corp. Acceptance.

We charge your account as follows:

Description	Detail	Total
Net Extra for boxing for export	\$47 00	
Net Extra for inland freight (10 cars)	27 00	
	<hr/>	
	\$74 00	\$740 00

Case #341319-328.

R. R. Car No. NYC—#498103.

Distr Order No. Cable #99 6 30 & Co. #157 6/30.

Disp—September 5, 1925.

Model—Chevrolet Superior Model "K" Touring Cars.

Marks: I M C O San Juan 157 Made in U. S. A.

Invoice #C 79388.

E. & O. E. EP.

General Motors Export Company.

Filed Nov. 10, 1925, Clerk's Office, United States District Court.

Antonio Aguayo, Clerk of Court, by F. Robles, Deputy Clerk.

[fols. 154-156] IN UNITED STATES DISTRICT COURT

SUPPLEMENTARY PRECIPUE FOR TRANSCRIPT OF RECORD—Filed  
February 23, 1926

To Antonio Aguayo, Esq., Clerk of the District Court of  
the United States for Porto Rico:

Please include in the transcript of the record in this  
case and send to the Circuit Court of Appeals for the First  
Circuit, in addition to the papers, pleading and proceed-  
ings already sent in the precipue of this case, the following:

Documents marked "Exhibits A-1" to "A-5," inclusive,  
Plaintiff.

San Juan, Porto Rico, this twenty-third day of February,  
1926.

Coll y Cuchi and Cruzado Silva, per Gust. Cruzado  
Silva, Solicitors for Complainants.

Copy of the above supplementary precipue for sending of  
Exhibits A-1 to A-5, inclusive, of Plaintiffs, to Court of  
Appeals is hereby acknowledged this twenty-third day of  
February, 1926.

George C. Butte, Solicitor for Defendant.

L. A.

Clerk's certificate to foregoing exhibits omitted in print-  
ing.

[fol. 157] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE FIRST CIRCUIT, OCTOBER TERM, 1925

No. 1903

INSULAR MOTOR CORPORATION, Plaintiff-Appellant,

v.

JUAN G. GALLARDO, TEGASUTEC, Defendant-Appellee

No. 1904, T. H. SMALLWOOD et al. v. SAME

No. 1908, ARMANDO VALDES ORDONEZ et al. v. SAME

9—Rec.

No. 1923, ALFONSO ALVAREZ RODRIGUEZ et al. v. SAME

No. 1924, ENRIQUE ZORRILLA et al. v. SAME

No. 1940, ENRIQUE ZORRILLA et al. v. SAME

No. 1941, ADOLFO VALDES ORDONEZ et al. v. SAME

No. 1942, T. H. SMALLWOOD et al. v. SAME

No. 1943, INSULAR MOTOR CORPORATION v. SAME

No. 1944, ADOLFO VALDES et al. v. SAME

No. 1945, ANTONIO RULLAN et al. v. SAME

No. 1946, MARIANO RODRIGUEZ et al. v. SAME

No. 1947, JOSE LEON et al. v. SAME

No. 1948, PRIMITIVO FRANCO et al. v. SAME

No. 1949, FINLAY, WAYMOUTH & LEE, INC., v. SAME

No. 1951, RAFAEL FABIAN et al. v. SAME

No. 1952, ANDRES GANDIA et al. v. SAME

No. 1953 JOSE RODRIGUEZ et al. v. SAME

No. 1954, GABINO SANCHEZ COTERA et al. v. SAME

No. 1955, ANGEL ARABCA PORTILLA et al. v. SAME

No. 1956, FRANCISCO FORTEZA et al. v. SAME

No. 1957, ANTONIO VICENS MAGRANER et al. v. SAME

No. 1958, PEDRO BONNIN et al. v. SAME

No. 1959, JUAN COLOM et al. v. SAME

No. 1960, GABRIEL TORRES et al. v. SAME

No. 1961, TOMAS ESTAPE et al. v. SAME

No. 1962, JUAN CABRER, JR., et al. v. SAME

No. 1963, MANUEL VIDAL ALVAREZ et al. v. SAME

No. 1964, JOSE B. ALVAREZ et al. v. SAME

[fol. 158] No. 1965, FERNANDO LUIS TORO et al. v. SAME

No. 1966, EUGENIO RODRIGUEZ et al. v. SAME

No. 1967, PEDRO JUAN ARMSTRONG et al. v. SAME

No. 1968, FEDERICO TORO et al. v. SAME

No. 1969, PEDRO FULLANA et al. v. SAME

No. 1970, HENRY PARACCHINI et al. v. SAME

No. 1971, MIGUEL ROSELLO et al. v. SAME

No. 1972, FRANCISCO GAVILAN GIRALDA et al. v. SAME

No. 1973, RAFAEL TORRES ALBERTI et al. v. SAME

No. 1974, JOSE DURAN ESMORIS et al. v. SAME

No. 1975, RAMON ARBONA et al. v. SAME

No. 1976, FRANCISCO BAGES QUINONES et al. v. SAME

No. 1977, JUAN BAUZA et al. v. SAME

No. 1978, ANTONIO VIVALDI PACHECO et al. v. SAME

Appeals from the District Court of the United States for  
the District of Porto Rico

Before Bingham, Johnson and Anderson, JJ.

OPINION AND JUDGMENT—September 25, 1926

JOHNSON, J.:

All these cases raise the question whether the District Court of the United States for Porto Rico had equitable jurisdiction because the complainants did not have a plain, adequate and complete remedy at law.

July 28, 1923, the Porto Rican Legislature enacted a law whose title is: "The excise tax law of Porto Rico." Under Title 2, part 1, sec. 20, the Act provided for the levying and collection, at one time only, of an Internal Revenue tax upon a long list of articles "produced, manufactured, sold or consumed in Porto Rico."

Section 33 of the Act is as follows:

"The tax hereby prescribed on articles for sale, use, consumption or exhibition in Porto Rico, except as provided in section 29 of this Act (which relates to the tax upon articles manufactured or produced in Porto Rico) shall be levied as soon as they are on the market in possession of a dealer or commission merchant or the representative thereof in this island, who shall be responsible for the payment of said taxes upon transferring said articles to another dealer or consumer, or upon acquiring them or having them in his possession, and who shall pay such taxes in one of the two following forms in accordance with such regulations as the Treasurer of Porto Rico may prescribe for the purpose: (a) Upon acquiring the taxable articles and having them in his possession, by making entries of receipt and delivery in the stock and receipt and delivery book, and by simultaneously paying the tax by cancelling the corresponding stamps on an internal revenue invoice; or (b) as he disposes of the taxable articles. Persons acquiring taxable articles through channels other than the aforesaid dealers or commission merchants or their representatives, shall pay said taxes as soon as they obtain possession of the articles and in accordance with the definition of *ad valorem* contained in this Act.

"Dealers shall be responsible for the payment of said taxes when they sell any taxable article to a consumer. The consumer shall be responsible for the payment of said tax when he acquires taxable articles, if such tax shall not have been paid."

Section 35 provides in part as follows:

"From and after the date on which this Act takes effect, every person, who, by himself or through his agents or representatives, acquires taxable articles for sale or transfer to another merchant or consumer, and on which the taxes

specified by this Act have not been paid, shall keep in his commercial establishment, from which it shall not be removed, except by authorization of the Treasurer of Porto Rico, an official book wherein entries shall be made of all taxable articles at the time they are acquired, and the corresponding entry at time of selling or otherwise disposing of them, and further, furnish all other information that the Treasurer of Porto Rico may by regulation prescribe for the purpose of determining the value and other circumstances in connection with such articles."

Some of these cases pray for an injunction to restrain the Treasurer of Porto Rico from collecting taxes levied under the provision of this Act.

By an Act approved August 20, 1925, the Legislative Assembly of Porto Rico enacted a law to supersede the Act of 1923, but providing that taxes due under the law repealed should remain in force and the Treasurer of Porto Rico be [fol. 160] empowered to make collection thereof in the same manner as provided in the repealed laws. Under this Act of 1925 a tax was authorized to be levied upon a long list of articles "sold, transferred, used or consumed in Porto Rico." The tax imposed by this Act is attacked as illegal in the other cases and an injunction is sought to prevent its collection.

June 23, 1924, the Legislative Assembly of Porto Rico passed a law entitled, "An Act providing for the payment of taxes under protest," etc., as follows:

"Section 1. Whenever a taxpayer believes that he should not pay a tax or part thereof because he understands that it is illegal, excessive or wrongful, he shall, however, have the obligation to pay the same in full upon request of the collector of taxes of his district, or of the official in charge of the collection of taxes, and shall ask the said collector or the said official in charge of the collection of taxes, should he desire to make any claim, to endorse the tax receipt specifically stating whether the said protest refers to the whole or to a part of the tax paid under protest, and setting forth the exact amount protested. The said endorsement shall be signed by the taxpayer and by the collector or officer in charge of the collection of taxes.

"Section 2. After payment is made, the collector of taxes or the official in charge of the collection of taxes, shall cover

the sum collected into the Treasury of Porto Rico, reporting to the Treasurer the total amount of the tax, as well as the part thereof paid under protest.

"Section 3. The moment that a tax paid under protest is received, the part thereof not protested, if there be any, shall be considered as all other receipts from taxes, the amount of which is to be applied to the obligations of the Insular Government, and in the case of property taxes the part of said tax pertaining to the respective municipalities pursuant to law, shall be paid over to them. The protested part shall be covered into a special fund to be known as 'Taxes paid under protest—Trust Fund.'

"Section 4. A taxpayer who shall have paid under protest the whole or part of any tax shall, within a term of not to exceed thirty days from and after the date of payment, sue the Treasurer of Porto Rico in a court of competent jurisdiction to secure the return of the amount protested, or the official in charge of the collection of taxes, shall cover [fol. 161] The Treasurer of Porto Rico, through the Attorney General or through the official designated by the latter from his department, shall answer the said suit within the term granted by law for the filing of answers and shall make therein, in their order, allegations to strike out particulars of the complaint and demurrers.

"When the case is ready for trial the court before which the action is pending shall fix the day for the trial thereof without the necessity of a request from the parties, first serving due notice on them.

"When final decision is rendered, if favorable to the taxpayer, the Treasurer of Porto Rico shall proceed to return to him the amount directed in the decision to be charged against the fund 'Taxes paid under protest—Trust Funds,' referred to in section 3 hereof.

"If the decision be favorable to The People of Porto Rico the Treasurer shall cover from the fund known as 'Taxes paid under protest—Trust Fund,' into the proper fund such amount of the tax as directed by the court in its decision, turning over to the respective municipalities the proportion established by law in cases of property taxes.

"Section 5. Either party may appeal to a higher court by filing in the court a quo his appeal within ten days after the decision is rendered, as provided by section 4 of this Act; provided, that if the taxpayer be the appellant he shall

file, together with the petition for appeal and in the court appealed from, a bond in such sum as the court shall fix to answer for such costs, expenses, and damages as The People of Porto Rico might suffer by reason of said action.

"The said appeal shall be prosecuted pursuant to the provisions of law for appeals in civil cases, and the court of appeals shall hold the hearing with preference over any other matter pending before it.

"Section 6. Any taxpayer filing a suit against the Treasurer of Porto Rico in accordance with the provisions of this Act shall attach to the said suit a receipt for the tax paid under protest, or a certified copy of said receipt.

"Section 7. That the sum of fifteen thousand (15,000) dollars or such part thereof as may be necessary is hereby appropriated, out of any funds in the Insular Treasury, not otherwise appropriated, for the payment by the Treasurer [fol. 162] of Porto Rico of such costs as by judgment of any competent court may be allowed to any taxpayer who shall have brought suit pursuant to this Act.

"Section 8. Act No. 17 of May 13, 1920, as well as all laws or parts of laws in conflict herewith are hereby repealed; provided, that any action, proceeding or right arising from and exercised under the Act hereby repealed, shall continue under the protection and provisions thereof until its termination.

"Section 9. It is hereby declared that an emergency exists for the immediate taking effect of this Act, and therefore the same shall take effect immediately after its approval."

This Act does provide a plain, adequate and complete remedy at law for the recovery of taxes paid under protest, and which was open to the appellants in all of these cases before us. The District Court so held and we think this was correct.

In *West India Oil Co. v. Gallardo*, 6 Fed. (2d) 523, the Porto Rican Act of 1923 was under consideration as well as the remedy at law which was afforded by the Public Acts of Porto Rico passed in 1920. It was there pointed out that the protesting taxpayer who afterwards attempted to recover a tax paid under protest must annex to his complaint "a certificate from the office of the Treasurer, setting forth that he has paid all his taxes," and it was there held that

the right to sue under such conditions did not constitute a plain and adequate remedy at law.

The objectionable features which were pointed out were eradicated by the Act of June 23, 1924.

There was no occasion, therefore, for the District Court to consider other questions after having found that the taxpayer had a plain, adequate and complete remedy at law in all of these cases, and all should have been dismissed, leaving the appellants to their remedy at law for the recovery of taxes paid under protest. The appellants, while admitting that the illegality or unconstitutionality of a tax is not of itself ground for equitable relief in the courts of the United States, still claim that additional equities are alleged which would give the Federal Court equitable jurisdiction.

That the illegality or unconstitutionality of a law is not sufficient ground for equitable relief has been many times [fol. 163] stated by the Supreme Court.

In *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 282, the court said:

"It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States," \* \* \* and that, "in order to give equity jurisdiction there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction, before the remedy by injunction can be awarded. The leading case on this subject is *Dows v. Chicago*, 11 Wall. 198."

In *Dodge v. Osborn*, 240 U. S. 118, in which the legality and constitutionality of the income tax law of 1913 was attacked, on the ground that, unless the collection of taxes assessed under this law was enjoined, many suits would be brought for the recovery of taxes and that, as the income tax law made the tax a lien upon the taxpayer's property, the assessment of taxes would constitute a cloud on his title. The court said:

"But these allegations are wholly inadequate under the hypothesis which we have assumed solely for the sake of the argument to sustain jurisdiction, since it is apparent on their face they allege no ground for equitable relief in

dependent of the mere complaint that the tax is illegal and unconstitutional and should not be enforced—allegations which if recognized as a basis for equitable jurisdiction would take every case where a tax was assailed because of its unconstitutionality out of the provisions of the statute and thus render it nugatory, while it is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable.”

The interference of the courts of the United States by injunction with the collection of taxes by a state or with its administration of matters of internal police can only be justified in a plain case not otherwise remediable. *Arkansas [fed.] Bldg. Association v. Madden*, 175 U. S. 269, 273. See also *Long v. Norman et al.*, 289 Fed. 5, a case in this Circuit.

It was the purpose of the Foraker Act and the Jones Act which succeeded it to confer sovereignty upon Porto Rico and an autonomy similar to that of the States. *Gromer v. Standard Dredging Co.*, 224 U. S. 362; *Porto Rico v. Riasa*, 227 U. S. 270.

The right to tax, for the purposes of government, one of the attributes of sovereignty was conferred upon Porto Rico by Congress and there is a stronger reason for applying the above rule to Porto Rico than to the States, in order that it may not be hampered and obstructed in raising revenue for the administration of its government. Congress has recognized the necessity of preventing the embarrassment of the United States in the collection of taxes assessed under the Internal Revenue laws by enacting section 3244 R. S., providing that, “No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.”

While we think this section is not applicable to Porto Rico, as pressed upon us in argument, yet, the principle involved is, and there are as strong reasons for its application to Porto Rico as to the United States.

We have therefore reached the conclusion that all these cases should be remanded to the District Court of Porto Rico with instructions to dismiss them for want of equitable jurisdiction, without prejudice to the right of the appellants

to bring actions at law in accordance with the provisions of the Act of June 23, 1924, and the amendments thereto.

The decree of the District Court is affirmed in each case, with costs in this court to the appellee.

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[fol. 165] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Titles omitted]

[fol. 166] PETITION FOR REHEARING

Come now the appellants and respectfully petition this Honorable Court to vacate the judgments entered in the [fol. 167] above entitled causes on September 25, 1926, and grant a rehearing upon the following grounds:

1. The Court has overlooked, and has decided directly contrary to, its own previous decision in *Camunas vs. Porto Rico Railway, Light & Power Co.*, 272 Fed., 924, in which the Court, upon careful consideration, expressly decided that a suit at law against the Treasurer of Porto Rico to recover taxes paid under protest is not such an adequate remedy at law as will defeat equitable jurisdiction.

The appellants relied upon that decision in bringing these suits, and it is unjust to prejudice them because of that reliance by now announcing a different rule.

Moreover, there are at least nine other causes now upon the docket of this court, to be argued at the coming January, 1927, session, in which the same question will be presented.

2. The Court has overlooked, and has decided directly contrary to, *Risty vs. Chicago, R. I. & P. Ry. Co.*, decided March 1, 1926, for this reason: The Porto Rican statutes expressly confine a taxpayer to the Insular courts, and exclude him from the Federal Court in suing for the recovery of a tax paid under protest. And in that case the Supreme Court of the United States expressly held that a remedy at law which may not be availed of in a Federal Court is not such an adequate remedy at law as will defeat equitable jurisdiction.

3. The decision in these causes is also contrary to *Hill vs. Wallace*, 259 U. S., 44, 62; *Union Pacific R. R. Co. vs. Weld County*, 247 U. S., 282; *Ohio Tax Cases*, 232 U. S., 576, 587; *Benedicto vs. West India & Panama Telegraph [fol. 168] Co.*, 256 Fed., 417, 421; *Benedicto vs. Porto Rican American Tobacco Co.*, 256 Fed., 422, 425; none of which is cited in the opinion of this court in these causes.

4. The Court has overlooked essential differences between these causes and *Boise Artesian Water Co. vs. Boise City*, 213 U. S., 276, and *Dodge vs. Osborn*, 240 U. S., 118, and *Long vs. Norman*, 289 Fed., 5, and has erroneously applied the principles of those decisions.

5. The Act of June 23, 1924, referred to in the opinion does not afford an adequate remedy because it does not provide for interest.

6. The judgments which this court has entered are such that the appellant cannot effectively pursue their alleged remedy at law, and there is grave danger that they will be forced to suffer a huge money loss merely because they relied upon this court's decision in the *Camunas* case, cited *supra*.

In specification of the foregoing, the Court's attention is respectfully called to the following comment:

# I

In *Camunas vs. Porto Rico Ry. L. & P. Co.*, 272 Fed., 924, decided by this Court in 1921, a suit in equity to enjoin the collection of assessments under the Porto Rican Workmen's Compensation Act was resisted upon the ground, among others, that the plaintiff had a complete and adequate remedy at law. In rejecting that contention this Court, per Anderson, J., said (p. 927):

[fol. 169] "We think the defendants' contention that the plaintiff has a plain and adequate remedy at law cannot be sustained. The case is, on the facts, easily distinguishable from that of *Camunas vs. New York & P. R. S. S. Co.*, 260 Fed., 40, 49, 171 C. C. A., 76. Moreover, the views expressed in that case, to the effect that the employer had a plain and adequate remedy at law for any unlawful as-

assessment under the Workmen's Compensation Act, were grounded upon the language of section 3 of the Porto Rican Act of March 9, 1911, entitled 'An Act to provide for the payment of taxes under protest,' which provides in explicit terms that the party paying under protest may 'sue the said treasurer \* \* \* in a court having competent jurisdiction thereto.' On the record then before the court there was not reason suggested for construing the words 'in a court having competent jurisdiction thereto' as not being broad enough to cover the federal court, if, by reason of diversity of citizenship or other ground for federal jurisdiction, the party alleging wrongful assessment had a right to resort to the federal court. Neither the Act of April 13, 1916, entitled 'An act to authorize suits against the people of Porto Rico,' nor the decisions of the Supreme Court of Porto Rico in *Sauri & Subira vs. Sepulveda*, 25 P. R., 224, and *Union Life Insurance Co. vs. Gromer*, 20 P. R., 80, were brought to the attention of the court. As it now appears that the Supreme Court of Porto Rico has construed the statute authorizing suits against the treasurer as suits against Porto Rico, and therefore permissible only to the extent authorized by the sovereign power (*Porto Rico vs. Rosaly*, 227 U. S., 270, 33 Sup. Ct., 352, 57 L. Ed., 507), and as under section 10 of the Act of April 13, 1916, it is provided 'that all such cases shall be brought only in [fol. 170] the insular district courts,' it is plain that the remedy for the recovery of taxes, paid under protest, under section 3 of the Act of March 9, 1911, is not an adequate remedy for a party having otherwise a right to resort to the federal court (*Smyth vs. Ames*, 169 U. S., 495, 516, 517, 18 Sup. Ct., 418, 42 L. Ed., 819; *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 362, 391, 14 Sup. Ct., 1032, 38 L. Ed., 1031; *Benedicto vs. Porto Rican American Tobacco Co.*, 256 Fed., 422, 425, 167 C. C. A., 550, and cases cited)."

The Act of April 13, 1916, there referred to, is still in force, and is as applicable to the Act of 1924 as it was to the Act of 1911. Moreover, the Act of June 23, 1924, quoted in the opinion in these causes, itself clearly requires that the suit against the Treasurer there authorized must be brought in an insular court and not in a federal court. It says that the taxpayer may "sue the Treasurer of Porto

Rico in a court of competent jurisdiction" and that is the precise phrase which was used in the Act of March 9, 1911, referred to in the *Camunas* case, *supra*, and the precise phrase which has been held *not* to be broad enough to cover a suit in the federal court. The Act of June 23, 1924, also regulates the procedure in detail. It says that the Treasurer shall answer the suit "within the term granted by law for the filing of answers and shall make therein, in their order, allegations to strike out particulars of the complaint and demurrers." It provides that when the case is ready for trial the court in which it is pending "shall fix the day for the trial thereof without the necessity of a request from the parties, first serving due notice on them." Certainly the Legislature of Porto Rico was not undertaking to tell the United States District Court how it should proceed in any cause brought before it. The Act further provides that an appeal must be taken within ten days, that if the taxpayer be the appellant he must file a bond, that the appeal "shall be presented pursuant to the provisions of law for appeals in civil cases," and that the appellate court "shall hold the hearing with preference over any other matter pending before it." Certainly this Court does not mean to say that the Legislature of Porto Rico was telling it how and when it shall hear its cases.

There thus can be no escape from the conclusion, deliberately pronounced in the *Camunas* case, that the remedy of paying the tax and suing the Treasurer to recover it back is available in the insular courts only and not in the federal court.

It is likewise impossible to escape the conclusion, also announced by this Court in the *Camunas* case, that such a remedy "is not an adequate remedy for a party having otherwise a right to resort to the federal court."

The decision here is thus utterly contrary to the decision in the *Camunas* case.

## II

In the recent case of *Risty vs. Chicago, R. I. & P. Ry. Co.*, decided March 1, 1926, the Supreme Court of the United States reiterated the rule that "the test of equity jurisdiction in a federal court is the inadequacy of the

remedy on the law side of that court and not the inadequacy of the remedies afforded by the State court." Consequently, for this Court now to say that these causes cannot be maintained in equity because of the remedy provided by the Porto Rican Act of June 23, 1924, is to go directly contrary to that decision of the Supreme Court. [fol. 172] We quote from the *Risty* case as follows:

"The assessment, if made, would have established a lien on the appellee's property which would be a cloud on title—to say nothing of the fact that the effect of the pending proceeding would have been to subject their property to future assessments; hence the case was one for equitable relief unless there was a plain and adequate remedy at law. *Ohio Tax Cases*, 232 U. S., 576; *Shaffer vs. Carter*, 252 U. S., 37, 46; *Chicago, B. & Q. R. R. vs. Osborne*, 265 U. S., 14. The remedy by appeal to the State court under §8469 does not appear to be co-extensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. *Smyth vs. Ames*, 169 U. S., 466; *Chicago, B. & Q. R. R. Co. vs. Osborne*, *supra*.

"It does not appear that the state law affords a remedy by payment of the assessment and suit to recover it back, which, if it exists, can be availed of in the federal courts, *Singer Sewing Machine Co. vs. Benedict*, 229 U. S., 481, 486, or that such remedy, if available, would not entail a multiplicity of suits. It is not suggested that §6826 of the state code, which permits suits to recover taxes and forbids injunctions to restrain their collection, has any application to assessments for drainage. In *Gilseth vs. Risty*, *supra*, the Supreme Court of the State evidently did not deem that section applicable, as it did not rely upon it in denying relief. The legal remedy under the state law being uncertain, the federal court has jurisdiction in equity to enjoin the assessment. *Dawson vs. Kentucky Distilleries Co.*, 255 U. S., 288."

[fol. 173]

## III

In *Hill vs. Wallace*, 259 U. S., 44, the suit was against the Secretary of Agriculture and others to enjoin the enforcement of an Act of Congress imposing a tax of 20 cents a bushel on certain contracts for the sale of grain for future delivery. It thus is exactly analogous to these causes. There the tax was imposed by Congress, and U. S. Rev. Stat., §3224, was applicable, whereas here this Court has held that §3224 is not applicable to Porto Rico. Consequently, the right to maintain a suit for an injunction is much stronger in these causes than it was in *Hill vs. Wallace*. Nevertheless, equitable jurisdiction was sustained in *Hill vs. Wallace*, and in so holding the Supreme Court said (p. 62):

"A further question arises as to whether this is a suit for an injunction against the collection of the tax in violation of §3224, Rev. Stats., in so far as it seeks relief against the District Attorney and Collector of Internal Revenue. Were this a state act, injunction would certainly issue against such officers under the decisions in *Ex parte Young*, 209 U. S., 123; *Ohio Tax Cases*, 232 U. S., 576, 587; *McFarland vs. American Sugar Refining Co.*, 241 U. S., 79, 82. Does §3224, Rev. Stats., prevent the application of similar principles to a federal taxing act? It has been held by this court, in *Dodge vs. Brady*, 240 U. S., 122, 126, that §3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also *Dodge vs. Osborn*, 240 U. S., 118, 122. In the case before us, a sale of grain for future delivery without paying the tax will subject one to [fol. 174] heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market in order to test the validity of the act would stop its 1,600 members in a branch of their business most important to themselves and to the country. We think these

exceptional and extraordinary circumstances with respect to the operation of this act make §3224 inapplicable."

With that quotation before it, we cannot believe that this Court will fail to see that its decision here does not comply with what was there said by the Supreme Court. In the cases here before the court a sale of almost any article of merchandise without paying the tax will subject the seller to "heavy criminal penalties" besides monetary penalties and seizure of his property. Here, as there, the tax is on "each of many daily transactions" and to pay the tax and then sue to recover it back "would necessitate a multiplicity of suits, and, indeed, would be impracticable."

In *Union Pacific R. R. Co. vs. Weld County*, 247 U. S., 282, the suit was to enjoin the collection of certain property taxes levied for a single year. The lower courts held that there was an adequate remedy at law, but the Supreme Court granted a certiorari and reversed their decision. We quote from the head note:

"Equity has jurisdiction to enjoin the collection of illegally discriminatory taxes, where the existence of an adequate and complete remedy at law is doubtful. [fol. 175] "Where the legal remedy by paying the taxes and suing to recover back necessitates separate actions against several school districts and towns, it will not displace the equitable remedy by injunction in one suit."

In *Ohio Tax Cases*, 232 U. S., 576, 587, the court said:

"The right to invoke the equity jurisdiction is clear; for the Act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of these actions (§117 of Act; §5506, Gen. Code); and the bills alleged threatened irreparable injury through the enforcement of the penalties and coercive features of the Act. *Shelton vs. Platt*, 139 U. S., 591, 598; *Ex parte Young*, 209 U. S., 123."

In the cases at bar this court has completely overlooked "the penalties and coercive features" of the statute here involved.

In *Benedicto vs. West India & Panama Telegraph Co.*, 256 Fed., 417, 421, this court said:

"The appellants contend that the plaintiffs below had a full, adequate, and complete remedy at law, that the people of Porto Rico was an indispensable party, and that the District Court was therefore without jurisdiction. These contentions cannot be sustained. The acts and threatened acts of interference with the plaintiff's rights and business were, and are, as we have held, without warrant, and on that ground, as well as to avoid a multiplicity of suits, there is plainly jurisdiction in equity. *Ex parte Young*, 209 U. S., 123, 159, 28 Sup. Ct., 441, 52 L. Ed., 714, 13 L. R. A. (N. S.), 932, 14 Ann. Cas. 764; *Philadelphia Co. vs. Stimson*, 223 U. S., 605, 32 Sup. Ct., 340, 56 L. Ed., 570, and cases cited." [fol. 176] There certainly will be at least an equal multiplicity of suits if the appellants here be remitted to the remedy of paying the taxes and suing to recover them back, for here the taxes are payable day by day and in many cases upon many transactions during one day. Indeed, the multiplicity of suits would be so great and so expensive as almost to force at least many of the appellants to abandon their legal rights. If they do not abandon them, then this court, instead of having forty of such cases upon its docket, will have approximately forty hundred.

In *Benedicto vs. Porto Rican American Tobacco Co.*, 256 Fed. 422, this court sustained a suit in equity to enjoin enforcement of a revenue act which provided for the affixing of stamps to packages containing cigars. The analogy between that case and the cases at bar, upon this point, is complete; for here the tax is paid by means of stamps and a failure to pay subjects the property to seizure. The decision which has been rendered here is thus irreconcilable with the decision there.

None of the cases to which we have here called attention is cited in the opinion of the court in these causes.

#### IV

The principle laid down in *Boise Artesian Water Co. vs. Boise City*, 213 U. S. 276, is one which we do not question in the least, viz., that the illegality or unconstitutionality of the tax is not of itself a ground for equitable relief. We submit, however, that the court has erroneously applied that principle here. In that case the only remedy which Boise

City had for the collection of the license fee there involved [fol. 177] was an action at law for its recovery (see p. 286), and thus there was ample opportunity for the plaintiff in that case to set up the defense of unconstitutionality in that action at law. The plaintiff there was not required to pay the tax first. It was not in danger of being subjected to any penalties, either monetary or criminal. Its property was not subject to seizure for failure to pay the tax, and there was no likelihood of a multiplicity of suits. All the elements which were absent there are present here, and that case in no way sustains the conclusion at which the court here has arrived.

In *Dodge vs. Osborn*, 240 U. S. 118, another case cited by the court in its opinion in these causes, the court was dealing with U. S. Rev. Stat., §3224, which, as above stated, this court has held is not applicable to Porto Rico. It is worthy of note, also, that, in referring to that case in its opinion in these causes, this court inadvertently overlooked three very important words which appear in the opinion in that case. This court said that it was there alleged that unless collection was enjoined "many suits would be brought" (see p. 7 of opinion). What the Supreme Court actually said was that "many suits by other persons will be brought." There is a broad and vital distinction between "many suits" and "many suits by other persons." The fact that forty different people bring separate suits does not constitute a "multiplicity of suits" in the sense in which that term is used in speaking of equitable jurisdiction. But if one person has to bring forty suits then there is a multiplicity of suits which it is one of the pre-eminent functions of equity to avoid. In other words, in *Dodge vs. Osborn* no multiplicity of suits was threatened, [fol. 178] whereas here that of itself is a sufficient reason for resorting to equity.

The aim of equity is to be just, and there is no justice in compelling the appellants to bring a suit every day, or at least every thirty days, in order to present the question of the validity of the statute.

In *Long vs. Norman*, 289 Fed. 5, another case cited in the court's opinion in these causes, the Massachusetts statute which was there held to constitute an adequate

remedy at law expressly provided that a suit to recover back taxes might be brought in a federal court (see amended Section 48 as quoted at the bottom of page 8 of 289 Fed.). That case is thus essentially different from the cases at bar, and we earnestly urge that this court clearly erred in following *Long vs. Norman* instead of the *Camunas* case.

## V

In *Proctor & Gamble Distributing Co. vs. Sherman*, 2 Fed., 2nd., 165, Judge Learned Hand, in sustaining a bill in equity to enjoin the collection of taxes, said (p. 166):

"But, quite independently of such doubts, the relief is inadequate because of the express refusal to allow interest. It is no answer to say that interest is not allowed against the sovereign. *U. S. vs. North Carolina*, 136 U. S., 211, 216, 10 S. Ct. 920, 34 L. Ed., 336; *District of Columbia vs. Johnson*, 165 U. S., 330, 338, 17 S. Ct., 362, 41 L. Ed., 734. The adequacy of the requisite legal remedy cannot be measured by the remedies one has against a person who is exempt from all process. If that were the test, the principal itself might be confiscated. While I have been referred to no decision on the point, it seems to me plain [fol. 179] that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled belief about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong."

The Porto Rican Act of June 23, 1924, does not provide for interest, and hence does not afford an adequate remedy.

It is true that by an amendment adopted in 1925 (not referred to in this court's opinion but quoted in the opinion of the District Court at pp. 52, 53 of Record in Nos. 1944-1949), interest is now provided for; but as to such of

these cases as were brought before the Act of 1925 was enacted this objection applies.

## VI

The District Court passed upon the merits and its decrees expressly adjudged that the taxes complained of are "valid and legal in every respect." By the judgments which this court has entered the decrees of the District Court are affirmed. Nothing is said in the judgments of this court about dismissing the suits for want of equitable jurisdiction without prejudice to the bringing of actions at law. Consequently, if these judgments of this court be not vacated, the legal effect will be that the decrees of [fol. 180] the District Court, as so affirmed by this court, may be set up as a bar to any action at law the appellants may bring.

To conform to the opinion of this court, its judgments should be that the decrees are reversed and the causes remanded with instructions to dismiss the bills for want of equitable jurisdiction without prejudice to the right of the appellants to bring actions at law.

But even if the judgments of this court were so modified, there still would be great danger that the appellants would be very greatly prejudiced by the action which the District Court and this court have taken. For this reason:

As a condition of staying the decrees during the pendency of the appeals, the District Court and this court both required the appellants to pay the taxes into the registry of the court. The amount paid pursuant to that requirement is now very large—several hundred thousand dollars at least. Most of it, of course, was paid more than thirty days ago, and the statute which this court says is an adequate remedy requires that the taxpayer shall pay under protest, obtain a receipt setting forth the protest, and then sue the Treasurer "within a term of not to exceed thirty days from and after the date of payments."

The vast sum which the appellants have deposited under the orders of this and the District Court will not be paid by the taxpayers. It will be paid by the clerk of the court. And there is at least grave danger that the collector to whom the money is paid will take the position that the appellants

have not brought themselves within the literal terms of the statute and refuse to give the required receipt with the necessary endorsement showing the protest. Or, it may [fol. 181] be contended that payment was made when the money was deposited, and an action to recover it may fail because not brought within thirty days. There is danger, too, that the insular courts may sustain one or the other of those positions. We do not say that such position would be sound. We do say it might be taken and sustained.

Thus, it is impossible for this court to assure the appellants that a dismissal of these suits would be actually without prejudice to an action at law. And the appellants and others similarly situated are faced with the possibility of losing amounts totalling over a million dollars because they relied upon a unanimous decision of this court (*Camunas case*, *supra*) made upon much consideration and directly deciding in their favor the precise point was adjudged against them.

We feel sure that the court will not deem it improper for us to remind it, in this connection, that when counsel were discussing the subject of adequate remedy at law upon the oral argument of these causes they were virtually stopped by a remark from the bench which, as counsel understood it, was a statement that the court was convinced that resort to equity was proper in these causes, and in consequence of that statement no further argument upon that subject was presented. That consideration, we submit, should incline the court to permit a further hearing—especially as the question will be again presented anyway in several other causes next January.

[fol. 182] We beg to add, too, that in the event that this court adheres to the decision it has announced our instructions are to apply for a writ of certiorari; and in order that the time for such application will not be running against the appellants while this application is being considered we respectfully suggest that the judgments entered herein on September 25, 1926, should be vacated and set aside now.

Wherefore, it is respectfully prayed that the judgments herein be vacated and that a rehearing of these causes be granted.

Respectfully submitted.

Francis G. Caffey, Counsel for Appellants in Nos. 1904-1943. Carroll G. Walter, Counsel for Appellants in Nos. 1944-1973. Nelson Gammons, Counsel for Appellants in Nos. 1974-1978.

We hereby certify that in our opinion the foregoing petition is well founded and that it is not presented for the purpose of delay.

Francis G. Caffey, Carroll G. Walter, Nelson Gammons.

October 14, 1926.

[fol. 183] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Titles omitted]

[fol. 184] Before Bingham, Johnson and Anderson, JJ.

OPINION ON REHEARING—JANUARY 7, 1927

PER CURIAM:

In these Porto Rican tax cases, attacking the validity of taxes levied under the Acts of July 28, 1923 and of August 20, 1925, this court, in its opinion of September 25, 1926, held against the appellants' claim of equity jurisdiction. Their petition of October 14, 1926, for rehearing was allowed. The cases have been reargued exhaustively and with very great ability and learning on both sides. On full consideration, the conclusions of this court are:

I. As the attorney general of Porto Rico concedes the correctness of the decision of this court in *Camunus v. Porto Rico*, 272 Fed. 924, and *West India Oil Co. v. Gallardo*, 6 Fed. (2d) 523, the question of jurisdiction in equity turns entirely upon the construction to be given to the Porto Rican legislation of 1924, Act No. 9, and 1925, Act No. 84. This court does not now decide that under that legislation actions at law to recover taxes paid under protest may not

[fol. 185] be maintained in the Federal court. But whether, as against objection, such jurisdiction can be sustained, is not entirely plain. The legislature of Porto Rico might well make it plain, as did the legislature of Massachusetts, by a simple statute quoted in *Long v. Norman*, 289 Fed. 5, 8. Apart from this doubt (*Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288, 296), the remedy at law is inadequate. For the taxes in question must be paid monthly, and the protesting tax payer must within thirty days after each payment bring his suit at law against the Treasurer. This involves multiplicity of suits by the same party to enforce the same right, and falls outside the rule laid down in *Dodge v. Osborn*, 240 U. S. 118, 121. Jurisdiction in equity must be sustained. *Risty v. Chic. R. I. & Pac. R. R.*, 270 U. S. 378; *Green v. Louisville, etc., R. R. Co.*, 244 U. S. 499, 507; *Chic., etc., R. R. Co. v. Osborne*, 265 U. S. 14, 16.

II. On the merits: the taxes on sales of goods taken into Porto Rico from the United States must be held valid under *Sonneborn v. Cureton*, 262 U. S. 506, and *West India Oil Co. v. Gallardo*, *supra*. While commerce between the United States and Porto Rico is not, technically, interstate commerce, the right of Porto Rico to tax the sales of goods arriving therein from the United States is not less than the right of a State to tax the sales of goods arriving therein in interstate commerce. *Brown v. Maryland*, 12 Wheat. 419, is not applicable to importations (so called) from the United States.

III. *Brown v. Maryland* is applicable to importations from foreign countries sold by the importers in the original packages, and the taxes as to such importations so sold must be enjoined. But the invalidity of such taxes does not affect other taxes. Compare §108 of the Act. Sales of such goods, not by the importers in the original packages, are taxable. *Waring v. The Mayor*, 8 Wall. 110. The right of Porto Rico to tax the sales of foreign importations is not greater than the corresponding right of a State.

IV. The appellants' minor contentions as to lack of uniformity and of due process are admittedly inconsistent with the decision of this court in *West India Oil Co. v. Gallardo*, *supra*. We regard the decision in that case as sound in principle and as fully supported by such cases as *Stebbins v. Riley*, 268 U. S. 137, 141, 142; *Billings v.*

United States, 232 U. S. 261, 280, 281; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 151, 152; *Knowlton v. Moore*, 178 U. S. 41.

V. Pending these appeals, under order of court, the taxes in question have been impounded in the hands of the clerk of the court below. The results are:

(1) In Nos. 1944, 1945, 1946, 1947 and 1949, there must be decrees providing for:

(a) Injunctions against the collection of taxes on sales in the original packages by the importers of foreign goods.

(b) Repayment to the plaintiffs of the impounded proceeds of such taxes.

(c) Payment to the defendant of the proceeds of all other taxes.

(d) If in any of these cases question arises as to the proper division of the impounded funds under (b) and (c), *supra*, such cases are to be remanded to the court below for determination of that question.

(2) In Nos. 1903, 1904, 1908, 1923, 1924, 1940, 1941, 1942, 1943, 1955, 1956, 1957, 1958, 1959, 1960, 1962, 1964, 1965, 1966, 1967, 1968, 1969, 1971, 1972, 1975, 1976, 1977 and 1978, the money impounded is to be paid over to the defendant and the bills dismissed.

(3) In Nos. 1948, 1951, 1952, 1953, 1954, 1961, 1963, 1970, 1973 and 1974 (the balance of the cases), the present records seem inadequate for mandates for final decrees; these cases are therefore remanded to the court below for further proceedings not inconsistent with this opinion.

(4) No costs are to be allowed to either side, in any of these cases, in this court.

The decrees of this court of September 25, 1926, are vacated, and the following decrees will be entered:

In each case enumerated in V. (1) and (3), *supra*, the decree of the District Court is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

In each case enumerated in V. (2), *supra*, the decree of the District Court is affirmed; neither party recovers costs on appeal.

## [fol. 187] IN UNITED STATES CIRCUIT COURT OF APPEALS

## MINUTE ENTRY

On April 27 and 28, 1926, these cases came on to be heard together and were fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

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## IN UNITED STATES CIRCUIT COURT OF APPEALS

## FINAL DECREE—September 25, 1926

This cause came on to be heard April 27 and 28, 1926, upon the transcript of record of the District Court of the United States for the District of Porto Rico, and was argued by counsel:

Upon consideration whereof, It is now, to wit, September 25, 1926, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed, with costs in this court to the appellee.

By the Court.

Arthur I. Charron, Clerk.

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## IN UNITED STATES CIRCUIT COURT OF APPEALS

Thereafter, to wit, on October 14, 1926, a petition for rehearing (page 165) was filed by the appellants upon which the following Order of Court was entered in each case on November 4, 1926:

## ORDER FOR REARGUMENT—November 4, 1926

The court desires reargument in this case.

By the Court.

Arthur I. Charron, Clerk.

## IN UNITED STATES CIRCUIT COURT OF APPEALS

Thereafter, to wit, on November 30 and December 1, 1926, these causes came on to be heard on reargument and were fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on January 7, 1927, an Opinion of the Court (page 183) was filed and the following Order of Court was entered in each case:

## ORDER VACATING DECREE—JANUARY 7, 1927.

The decree of this court of September 25, 1926, is hereby vacated.

By the Court.

Arthur I. Chatton, Clerk.

## [fol. 188] IN UNITED STATES CIRCUIT COURT OF APPEALS

## FINAL DECREE—JANUARY 7, 1927

This cause came on to be heard on reargument on November 30 and December 1, 1926, upon the transcript of record of the District Court of the United States for the District of Porto Rico, and was argued by counsel:

Upon consideration whereof, It is now, to wit, January 7, 1927, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed; neither party recovers costs on appeal.

By the Court.

Arthur I. Chatton, Clerk.

## IN UNITED STATES CIRCUIT COURT OF APPEALS

## MOTION FOR STAY OF MANDATE—Filed JANUARY 28, 1927

Come now the appellants in the above entitled causes and represent that they intend to file in the Supreme Court of the United States a petition or petitions for writs of certiorari herein.

Wherefore, they severally move that the issue of mandate upon the decrees of affirmance entered January 7, 1927, be stayed pending the determination by the Supreme Court of their aforesaid petition or petitions or until the further order of this court.

Dated January 25, 1927.

Francis G. Caffey, Attorney for Appellants.

No objections. William Catron Rigby, Atty. for Appellee.

January 27, 1927.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—January 28, 1927

It is ordered that mandate herein be, and the same hereby is, stayed until further order of court.

By the Court.

Arthur I. Charron, Clerk.

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[fol. 189] Clerk's certificate to foregoing transcript omitted in printing.

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Endorsed on cover: File Nos. —. U. S. Circuit Court of Appeals, First Circuit. Term No. —. T. H. Smallwood, W. F. Smallwood, A. D. Smallwood, et al., etc., petitioners, vs. Juan G. Gallardo, Treasurer of Porto Rico. Term No. —. Adolfo Valdes Ordonez, Salvador Garcia, Victor Ochoa, et al, petitioners, vs. Juan G. Gallardo, Treasurer of Porto Rico. Term No. —. Insular Motor Corporation, petitioner, vs. Juan G. Gallardo, Treasurer of Porto Rico. Petition for writs of certiorari and exhibit thereto. Filed — —, 1927. File Nos. —.

## SUPREME COURT OF THE UNITED STATES

## ORDER ALLOWING CERTIORARI—Filed May 16, 1927

The petition herein for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted and the cases are set for hearing on the first day of next term, Monday, October 3 next, after the cases heretofore assigned for that day, on the sole question whether they have become moot by virtue of the act of March 4, 1927, amending section 48 of the organic act of Porto Rico.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6630)

# TRANSCRIPT OF RECORD

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## Supreme Court of the United States

OCTOBER TERM, 1957

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No. 214

ADOLFO VALDES, PIO PEREZ, LUIS O. GUYAR,  
ET AL., ETC., PETITIONERS,

vs.

JUAN G. GALLARDO, TREASURER OF PORTO  
RICO

No. 215

FINLAY, WAYMOUTH & LEE, INC., PETITIONER,

vs.

JUAN G. GALLARDO, TREASURER OF PORTO  
RICO

No. 216

ANGEL ABARCA PORTILLA, RAFAEL ABARCA  
PORTILLA, ENRIQUE ABARCA SANFELIX,  
ET AL., ETC., PETITIONERS,

vs.

JUAN G. GALLARDO, TREASURER OF PORTO  
RICO

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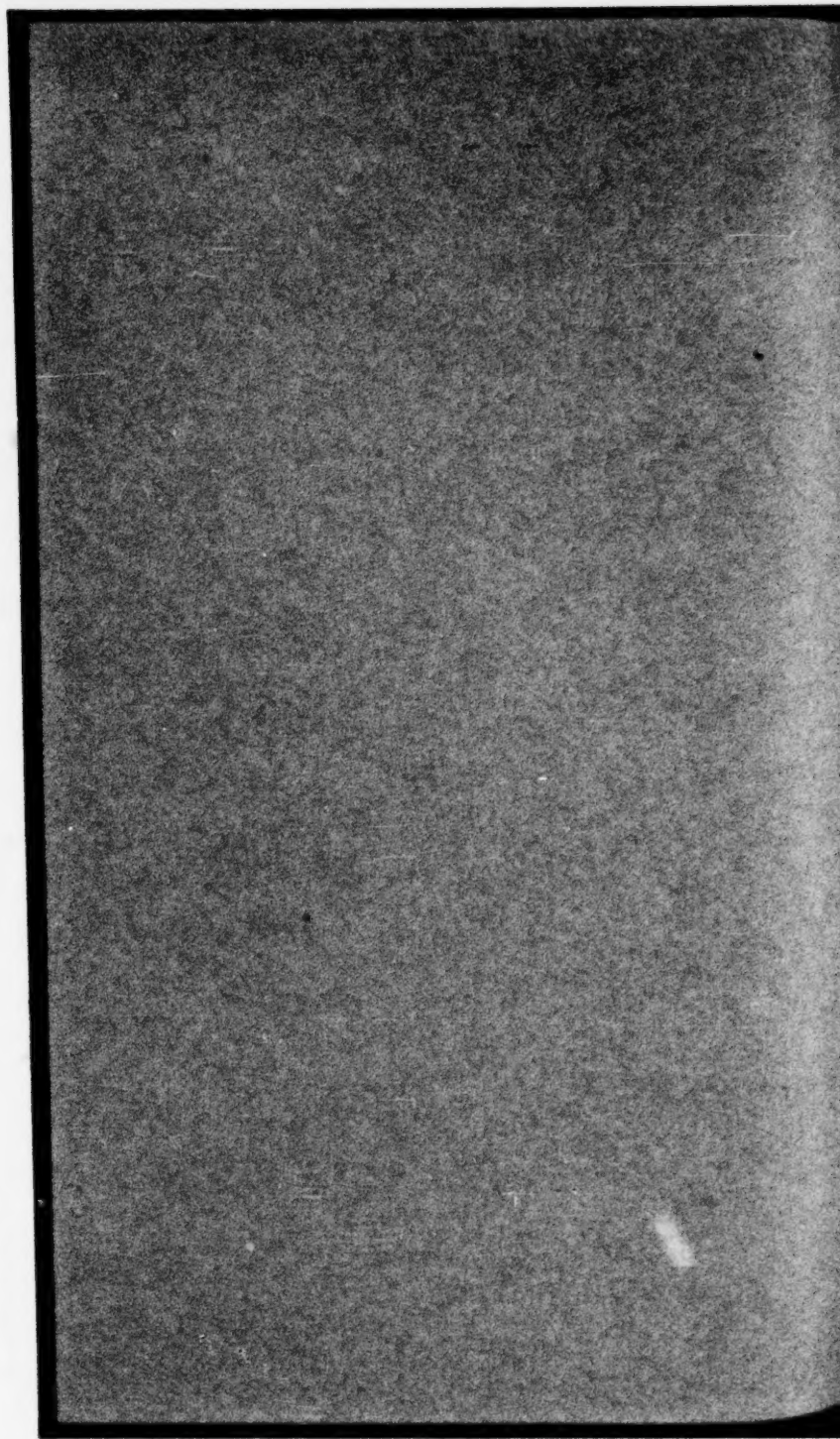
ON WRITS OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE FIRST CIRCUIT

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WRITING FOR CERTIORARI FILED APRIL 4, 1957

CERTIORARI GRANTED MAY 11, 1957

(32,588, 32,589, 32,590)



( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No.

ADOLFO VALDES, PIO PEREZ, LUIS C. CUYAR,  
ET AL., ETC., PETITIONERS,

VS.

JUAN G. GALLARDO, TREASURER OF PORTO  
RICO

No.

FINLAY, WAYMOUTH & LEE, INC., PETITIONER,

VS.

JUAN G. GALLARDO, TREASURER OF PORTO  
RICO

No.

ANGEL ABARCA PORTILLA, RAFAEL ABARCA  
PORTILLA, ENRIQUE ABARCA SANFELIZ, ET  
AL., ETC., PETITIONERS,

VS.

JUAN G. GALLARDO, TREASURER OF PORTO  
RICO

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIRST  
CIRCUIT

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[fols a-1]

**IN UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIRST CIRCUIT, OCTOBER TERM, 1925**

No. 1944

ADOLFO VALDES et al. (J. Ochoa y Hno.), Plaintiffs, Appel-  
lants,

v.

JUAN G. GALLARDO, *Treasurer*, Defendant, Appellee

**Transcript of Record of District Court**—Filed in Circuit  
Court of Appeals February 2, 1926

IN UNITED STATES DISTRICT COURT, DISTRICT OF PORTO RICO

BILL OF COMPLAINT—Filed October 2, 1925

To the Honorable Judge of the United States District Court  
for Porto Rico:

The above-named complainants by their solicitor respect-  
fully set forth the following facts calling for equitable re-  
lief, namely:

1. That complainants Adolfo Valdes, Pio Perez, Luis C. Cuyar and Salvador Garcia are co-partners, doing business under the firm name and style of J. Ochoa y Hno., and are all of them subjects of the King of Spain, residing and domiciled in the Island of Porto Rico.

2. That the defendant, Juan G. Gallardo, is the duly qualified and acting Treasurer of Porto Rico, of which he is a resident and in which he is domiciled.

3. That the matter in controversy exceeds, exclusive of interest and costs, the value or amount of \$3,000.

[fol. 2] 4. That the complainants are now and for many years last past have been engaged in the business of selling provisions, building materials and supplies and other merchandise, at wholesale, in the City of San Juan, Porto Rico; that in said business they have invested large sums of

1—Rec.

money and have built up a large and valuable business and good will. Complainants purchase and import from continental United States and from foreign countries all of the articles sold by them in their said business. They import cement from Denmark which they sell in the original packages or barrels in which the same is imported and they also import matches from Santo Domingo, which they likewise sell in the original packages, to an amount of at least two thousand gross of boxes, containing not less than twenty-five matches per box, monthly.

5. At the last ordinary session of the Legislature of Porto Rico Act No. 85 was passed and was approved by the Governor of Porto Rico on August 20, 1925. The said Act was entitled "An Act to Provide Revenues for the People of Porto Rico by Levying Certain Sale Taxes and Taxes for the Manufacture, Use, Sale and Consumption of Certain Products and by the Levying of Certain Excise and License Taxes on Certain Occupations, Industries or Businesses; to Impose Certain Penalties; to Repeal the Laws in Force Providing for Excise and License Taxes, and for Other Purposes."

Title I of the said Act is comprised of definitions of terms, employed in the Act; Title II (Section 16) of the Act entitled "Excise Taxes" provides for the levy and collection of a tax to be collected and paid "once only" on the sale, transfer, use or consumption of enumerated articles; Title III of the said Act entitled "Sales Taxes" provides for the levy and collection of a tax of two per cent on the sale of "any articles the object of commerce" not subject to the excise tax levied in Title II or specifically exempted in Section 83 of the Act, and Title IV deals with "License Taxes" on the businesses and occupations specified therein.

[fol. 3] 6. That the only articles sold by complainants subject to the excise tax provided by Title II of the said Act are matches, upon which a tax of twenty (20) cents on every gross of boxes, the contents of which are not less than twenty-five (25) or more than one hundred (100) sticks per box, is imposed by the said law. Defendant construes the said law as requiring the payment of the said tax of twenty (20) cents per gross upon the matches imported by complainants from a foreign country and sold in the

original packages as aforesaid, and is enforcing and collecting the said tax from complainants on the said matches under his said construction of the law. That the said Excise Tax Law, as so construed and enforced by defendant, is invalid for the reason that it imposes an illegal burden on foreign commerce in contravention of the commerce clause of the Constitution of the United States and of the provisions of the Organic Law of Porto Rico prohibiting a tax on imports.

7. That all articles sold by complainants, except provisions and matches, which the defendant construes to be subject to the Excise Tax as aforesaid, are subject to the sale taxes of two per cent on the price or value of the articles sold imposed under and by Title III of the said Act.

Section 62 of the said Act, which is the first section of Title III, fixes and defines this tax as follows:

"There shall be levied and collected on the sale of any articles the object of commerce not specified in Section 16 of this Act or exempted from taxation as provided in said section a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which shall be paid at the end of each month by the person making such sales."

Section 83 exempts certain persons and articles from the payment of such tax as follows:

"Any person comprised within the provisions of Section 62 of this Act, except manufacturers whose total monthly sales do not exceed one hundred (100) dollars, shall be [fol. 4] exempt from the payment of the tax specified in said section; Provided, that when one person alone shall have several businesses, under separate accounts, the amounts of the monthly sales of these should together amount to less than one hundred (100) dollars so as to be comprised within the exemption hereby established; Provided, further, that the tax provided by Section 62 of this Act shall not attach to (1) food stuffs, (2) fluid gas; (3) electric current; (4) fertilizers as well as all raw material used in the manufacture of fertilizers; (5) charcoal and wood; (6) jewels and precious and semi-precious stones; (7) the sales made by agriculturists of their crops and live

stock; (8) the sale of newspaper, to newspaper advertisements and literary, scientific and philosophical works and to public school text books."

Section 65 of the Act requires all persons obligated to pay the sales tax to keep books of account under such requirements as the Treasurer of Porto Rico shall by regulation prescribe and section 69 obliges "every manufacturer, wholesale dealer, retail dealer, representative, commission merchant or any other person making sales" to produce and exhibit his books to authorized officers of the Department of Finance. Affidavits showing the gross proceeds of monthly sales are to be filed on the last day of the month and not later than the ten days following. The tax is to be paid by affixing internal revenue stamps to documents prepared by the Treasurer for that purpose and cancelling such stamps but no such payment is final until approved by the Treasurer or his duly authorized internal revenue agents.

8. The sales tax so provided in and by Title III of the said Act is a tax on property. All sales of articles the object of commerce, except those expressly excluded, at any time and place are subject to the tax. Liability to payment is in no way conditioned upon or incidental to the exercise of any privilege, the employment of any facility or engaging in any occupation not common to all citizens. There is no classification (for exemption is not classification).

For these reasons complainants alleged that the law im-[fol. 5] posing the sales tax is invalid for repugnance to the rule of uniformity prescribed by the Organic Act in that property exempted from the operation of this tax is subject to property taxes under the provisions of the Political Code of Porto Rico.

9. If the said sales tax law be held to be an excise tax it is likewise invalid for repugnance to the provisions of the Fourteenth Amendment to the Constitution of the United States and the similar provisions of the Organic Act in that the classification, if indeed it be classification, is arbitrary and based on no proper or justifiable restrictions. Thus out of the mass of citizens who sell articles the object of commerce are segregated and excluded from the operation of the law, those whose monthly sales of articles the object

of commerce do not exceed one hundred dollars, and agriculturists with respect to their crops and live stock, all members of the same class.

In this connection complainants allege that there are a very large number of retail dealers in Porto Rico who sell principally foods stuffs, but who also carry in stock and sell in competition with complainants and other dealers clothing, shoes, crockery, implements and other taxable articles, including some of those sold by complainants, whose individual monthly sales of such taxable articles do not exceed one hundred dollars but whose aggregate sales of such articles amount to several thousand dollars monthly.

10. Notwithstanding the fact that the said sales tax law imposes a tax on all successive sales of a taxable article, the defendant has construed it to provide for the collection of the tax upon only one sale of the same article and is collecting and requiring the payment of such tax only upon the first sale of the taxable article in Porto Rico whether such first sale be made by the manufacturer, wholesaler, retail dealer or other person.

According to defendant's construction of the law, retailers and other persons are only required to pay the tax whether they purchase the taxable articles from manufacturers or dealers in continental United States or foreign countries. Defendant is administering the law, as complainants are informed and believe, in accordance with the [fol. 6] theory and construction above set out and in so singling out sales by manufacturers and wholesalers for the collection of the tax and exempting wholesale and retail dealers and other persons who purchase the articles they sell from such domestic manufacturers and retailers is acting without legal warrant and without authorization of the Act in suit. The defendant is equally unauthorized by the law in requiring payment of the tax from retail dealers who purchase in and import the taxable articles so purchased from continental United States or foreign countries while he exacts no tax from the retail dealers who purchase from domestic or Porto Rican manufacturers and wholesale dealers.

The said tax law as thus construed and administered by defendant discriminates unlawfully against manufactures and products of continental United States and in favor

of domestic or Porto Rican manufactures and products and imposes an unequal burden on the former.

And complainants charge that the sale tax law construed and administered as above set out deprives complainant of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and the Organic Law of Porto Rico, and is also violative of the commerce clause of the Constitution of the United States.

11. Complainants further allege that defendant illegally requires of complainants the payment of the sales tax on cement imported by complainants from Denmark and sold by complainants in the original packages, and that the said law as so construed by defendant is invalid, so far as it imposes a tax upon complainants' said cement, for repugnancy to the commerce clause of the Constitution of the United States and the provisions of the Organic Law of Porto Rico prohibiting an importation tax on imports.

12. Complainants' annual sales of matches imported from Santo Domingo amount to two thousand (2,000) gross of boxes per month, or twenty four thousand (24,000) gross of boxes per year, and its sales of such articles for the next twelve months will amount to at least twenty-four thousand (24,000) gross of boxes, upon which the tax exacted [fol. 7] by the defendant will be not less than \$4,800. The gross annual sales of cement imported by complainants from Denmark and sold in the original packages amount to more than one hundred thirty seven thousand (137,000) dollars per year and for the next twelve months will amount to not less than one hundred thirty-seven thousand (137,000) dollars, and the tax imposed upon the sale of the same under Title III of the said Act will be at least two thousand seven hundred (2,700) dollars. Complainants' annual sales of all other articles subject to the said sales tax amount to five hundred sixty six thousand (566,000) dollars and will not be less that amount for the next twelve months. The tax upon such sales imposed under Title III of the said Act will amount to not less than eleven thousand three hundred twenty (11,320) dollars.

13. That the defendant demands that complainants furnish the monthly statements and affidavits of gross sales

required by the said law and the monthly payment of said taxes, the next payment of which is due on October 10, 1925, and that defendant threatens that if complainants refuse or fail to make such declarations and statements or to pay the said taxes that he will seize and sell complainants' property to satisfy the tax and penalty provided by the said law and will institute criminal proceedings against complainants to subject complainants to severe fines and imprisonment.

14. That the said taxes "Excise" and "Sale" are imposed directly upon the vendors, and as to the sale tax, complainants will not be able to collect the same from purchasers; that an increase in prices to include such tax, or attempt to pass the same on to customers, will result in the destruction of the complainants' wholesale business in that dealers heretofore purchasing from complainants will purchase directly from dealers in the continental United States.

15. That defendant is not financially able to respond in damages for the loss sustained and to be sustained by complainants through the aforesaid unlawful acts of defendant; that if the threatened acts of defendant are not restrained by this Honorable Court, complainants will suffer irreparable loss and injury, as to which complainants have no [fol. 8] adequate remedy at law, nor would remedy at law be adequate even if available in this court and even if it were possible under the laws of Porto Rico to recover from the Treasurer the aforesaid taxes unlawfully collected, since such remedy would involve a multiplicity of suits, and since the said taxes in addition to existing lawful taxes are so burdensome, the acts and duties prescribed by the said law so onerous and the resulting disorganization and loss and damage to complainants' business and good will so great pending the final decision of such suits, that complainants would suffer irreparable loss.

16. Complainants accordingly state that the said defendant is acting without any lawful authority or warrant in requiring complainants to furnish statements and affidavits of their sales and to pay the so-called excise tax upon matches imported by them from foreign countries and sold in the original packages and so-called sale tax upon the sale of cement imported from foreign countries and sold

in the original packages and all other articles subject to the said tax and in threatening to seize and sell complainants' property and to bring criminal proceedings to compel the payment of the said taxes, and that defendant being without such authority and warrant his acts and threatened acts will constitute trespasses and unwarranted interference with complainants' said business and that unless said defendant and those acting by, under or through him be enjoined from said unlawful acts, complainants will suffer irreparable loss and damages in at least the sum of one hundred thousand (100,000) dollars, as against which complainants are without adequate remedy at law.

Forasmuch as complainants are without adequate remedy for the wrongs aforesaid except in a Court of Equity, complainants pray that defendant be required to make full, direct, true and perfect answer, according to the utmost of his knowledge, information and belief, unto the allegations of this complaint (but not under oath, and oath being hereby expressly waived), and complainants pray that the defendant and all persons acting by, under or through his authority be, pending this suit, and perpetually, enjoined and restrained from seizing complainants' property and [fol. 9] from prosecuting or threatening to prosecute the complainants by reason of the failure or refusal to make and furnish the statements and affidavits required by Title II and Title III of the Act No. 85 of the Legislature of Porto Rico approved August 20, 1925, or from collecting or attempting to collect the excise tax upon matches imported by complainants and sold in the original packages or the sales tax upon cement imported from foreign countries by complainants and sold in the original packages, or from attempting to collect or require complainants to pay the sales tax provided in the said Title III upon sales of articles subjected to the said tax in the said title and Act, and that complainants be granted general relief in the premises.

Henri Brown, Solicitor for Complainants.

*Duly sworn to by Salvador Garcia. Jurat omitted in printing.*

[fol. 10]      IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY INJUNCTION AND FOR RESTRAINING  
ORDER—Filed October 8, 1925

Now come the above-named complainants and upon the verified bill of complaint filed herein move the court for a temporary injunction restraining the above-named defendant, Juan G. Gallardo, who is Treasurer of Porto Rico, and all persons acting by, under and through his attorney, during the pendency of the above-entitled action, from seizing complainants' property and from prosecuting or threatening to prosecute complainants by reason of complainants' failure or refusal to make and furnish the statements and affidavits required by Title II and III of Act No. 85 of the Legislature of Porto Rico, approved August 20, 1925, or from collecting or attempting to collect the excise tax upon matches imported by complainants and sold in the original packages, or the sales tax upon cement imported from foreign countries by complainants and sold in the original packages, or from attempting to collect or require complainants to pay the sales tax provided in the said Title III upon sales of articles subjected to the said tax in the said title and Act.

Complainants further move the court for a temporary restraining order without notice restraining the above-named defendant and all persons acting by, under and through his authority from doing any of said acts until the application of complainants for a temporary injunction can be heard, on the ground that the Act hereinbefore mentioned has by its terms taken effect and is being enforced by defendant and that before complainants can give notice of an application for a temporary injunction and before such application can be heard, complainants will be compelled to expend considerable sums of money in the payment of the taxes which they have no remedy or means of recovering back, or that their property will be seized and sold or criminal prosecutions be instituted against complainants for non-compliance with said Act.

Henri Brown, Solicitor for Complainants.

[fol. 11] IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER AND ORDER TO SHOW CAUSE—October 9,  
1925

The complainants herein having filed their verified bill of complaint in this court against the above-named defendant praying for a temporary and permanent injunction, and together with such bill of complaint a motion for a temporary injunction and a restraining order, and this court having duly read and considered the same, it is hereby

Ordered: That Juan G. Gallardo, as Treasurer of Porto Rico, defendant herein, show cause before this court in the court room at San Juan, Porto Rico, on the fourteenth day of October, 1925, at 9 A. M., why a temporary injunction should not issue in accordance with the prayer in said bill of complaint contained.

Let a copy of this order and of the bill of complaint be forthwith served upon the defendant herein named.

San Juan, Porto Rico, October 9, 1925.

Ira K. Wells, Judge.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 8, 1925

To the Honorable Ira K. Wells, Judge of the District Court  
of the United States for Porto Rico:

Now come the Attorney General of Porto Rico and undersigned counsel, and in behalf of the Treasurer of Porto Rico, the defendant, hereby file the answer to the bill of complaint, respectfully alleging:

1. On information and belief, defendant denies paragraph 1 of the complaint, and especially that plaintiffs are subjects of the King of Spain.

2. Defendant admits paragraph 2 of the complaint.

3. Defendant denies that the amount involved in this suit is \$3,000, exclusive of interest and costs.

4. Defendant denies each and every allegation of paragraph 4 of the complaint, except that plaintiffs have their place of business in San Juan, Porto Rico; and especially denies that the articles mentioned in this paragraph are sold in the original package.

[fol. 12] 5. Defendant admits the law as quoted in paragraph 5 of the complaint.

6. Defendant, for want of information, denies each and every allegation of paragraph 6 of the complaint, and especially that the construction placed by defendant upon the law is unconstitutional.

7. Defendant denies each and every allegation of paragraph 7 of the complaint except as to the law therein quoted, and otherwise alleges that the payment of the tax is complete when the revenue stamps are cancelled.

8. Defendant denies each and every allegation of paragraph 8 of the complaint, and especially that the tax imposed is a property tax, or that the same is contrary to the Organic Act of Porto Rico, otherwise alleging that said tax is an excise tax authorized by the Organic Act of Porto Rico.

9. Defendant denies each and every allegation of paragraph 9 of the complaint, and especially that any retail dealers in Porto Rico have been assessed for the sales tax in a different manner than complainants. Defendant furthermore denies that the sales tax is contrary to the United States Constitution or to the Organic Act of Porto Rico.

10. Defendant denies each and every allegation of paragraph 10 of the complaint, except the construction therein alleged that the tax should be paid by the first sale made in Porto Rico, which construction is hereby admitted; but defendant denies that the sales tax is unconstitutional.

11. Defendant denies each and every allegation of paragraph 11 of the complaint, and especially that the tax is imposed on merchandise while in the original package.

12. Defendant denies each and every allegation of paragraph 12 of the complaint, and especially the amounts

therein included, and that said merchandise is sold in the original package.

13. Defendant, in answering paragraph 13 of the complaint, admits that complainants have been requested to file the monthly statements, according to law; but denies that any threats have been made, or proceedings have been instituted, either civil or criminal, against complainants.

[fol. 13] 14. Defendant denies each and every allegation of paragraph 14 of the complaint, and especially that plaintiffs will not be able to collect the tax from the purchasers; otherwise alleging, on information and belief, that plaintiffs have been collecting said taxes from the purchasers and have not turned them into the Treasury of Porto Rico; and defendant especially alleges that the objections raised by plaintiffs against the enforcement of the sales tax are argumentative and unsound and have only the effect of obstructing, interfering and delaying the collection of the tax, and hindering the Government in the administration of the island.

15. Defendant denies each and every allegation of paragraph 15 of the complaint and especially that the complainants will suffer irreparable injury; otherwise alleging that the enforcement of the said tax in no way interferes with plaintiffs' business.

16. Defendant denies each and every allegation of paragraph 16 of the complaint, and especially that plaintiffs will suffer the damages in the amount alleged in this paragraph, or in any other sum. Defendant furthermore denies that the tax is imposed on the article in the original package.

#### Special Defense

As a special defense, defendant alleges:

That the excise tax imposed and levied according to Section 16, as well as the sales tax imposed and levied in accordance with Section 62 of Act No. 85 of 1925, known as the Internal Revenue Law of Porto Rico, are excises assessed, imposed and collected on the sale of the article, when said article has become part of the mass of property of the taxpayer, and when the possession has been transferred by the

sale from the vendor to the vendee, and after the article has acquired a situs in the Island of Porto Rico; that Act No. 85, above mentioned, is an Internal Revenue Law approved by the Legislature of Porto Rico within the powers granted by the Organic Act of 1917, and does not contravene or oppose the Constitution of the United States, which is not per se in force — Porto Rico, nor is contrary to any of the [fol. 14] provisions of the Organic Act above mentioned, or to any Federal statute enforceable in the Island of Porto Rico.

Wherefore, your defendant prays the court to dismiss the bill of complaint herein filed, with costs against plaintiffs, granting any other remedy that the court may deem meet and proper.

San Juan, Porto Rico, October 13, 1925.

George C. Butte, Attorney General of Porto Rico,  
J. A. Lopez Acosta, of Counsel.

*Duly sworn to by Juan G. Gallardo. Jurat omitted in printing.*

[fol. 15]      IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY—October 14, 1925

These cases came on to be heard on orders to show cause why preliminary injunctions should not issue. Counsel for defendant stated that answers under oath had been filed by defendant in each case denying all material allegations and equities and that defendant was ready to go to trial. Counsel for complainants stated that complainants were willing to commence the trial of the causes provided that defendant would stipulate that he would take no action against complainants to compel payment of taxes pending final decree.

Counsel for defendant stated that he would not make such stipulation. Counsel for complainants then insisted that the motion for preliminary injunction be heard and determined and asked leave to file the affidavits prepared in

support of the motion. Thereupon counsel for defendant, after consultation with defendant, stated that defendant was willing to stipulate that he would take no action against complainants pending suit provided that complainants would file monthly reports of their sales. To this counsel for complainants agreed. The court then directed that the said stipulation be reduced to writing, signed by counsel for the parties and filed.

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JOURNAL ENTRY—October 14, 1925

This case is this day heard by the court on its merits. George C. Butte, Attorney General of Porto Rico, and J. A. Lopez Acosta, Esq., Assistant Attorney General of Porto Rico, appear for the defendant and J. Henri Brown, Esq., appears for the complainant. Upon motion of attorney for complainant he is allowed to amend the complaint by interlineation by inserting after the word Spain in the first paragraph the words "except Luis Cuyar, who is a citizen of the United States." Thereupon the court hears testimony in behalf of the complainant and the further hearing of the case is continued until Friday, October 16, 1925, at 9 o'clock A. M.

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[fol. 16] JOURNAL ENTRY—October 16, 1925

The hearing of this case upon its merits is resumed, all parties being present. The plaintiff is permitted to open its case and the court hears further testimony of the witness Salvador Garcia in behalf of the plaintiff and the plaintiff closes its case. Thereupon the court hears testimony in behalf of respondent. Documentary evidence is also introduced by the respondent and the case is left open for the agreed sworn statements to be presented by the plaintiff and included in the record as part of the testimony of the witness Salvador Garcia and for cross-examination thereof by the defendant.

## IN UNITED STATES DISTRICT COURT

STIPULATION OF AGREEMENT—Filed October 16, 1925

To the Honorable Ira K. Wells, United States District Judge:

Now come the parties above mentioned, the plaintiffs represented by their attorney, Henri Brown, and the defendant by the Attorney General of Porto Rico and the undersigned counsel, and stipulate and agree as follows:

That in the above-entitled cases, now pending trial before the United States District Court for Porto Rico, the defendant, Juan G. Gallardo, will not issue orders to institute criminal proceedings against the persons of the plaintiffs, or issue orders of attachment against their property, and on the other hand, the plaintiffs agree and stipulate to file the monthly sworn statements required by Sections 63 64, 65 and 66 of Act No. 85 (Internal Revenue Law of 1925), and also to furnish the information required by the Treasurer in connection with the excise taxes imposed by Section 16 of the Act above referred to.

It is understood by the parties that this information is to be furnished only with the object of liquidating the tax, and that none of the parties will forfeit any right, privilege or remedy involved in the cases now before this court.

That this stipulation and agreement shall be effective and [fol. 17] valid from the date of its approval by this court, only until date of the decision of these cases by this court and no longer.

San Juan, Porto Rico, October 15, 1925.

J. H. Brown, Attorney for Complainant. George C.  
Butte, Attorney General of Porto Rico. J. A.  
Lopez Acosta, of Counsel.

Approved. Ira K. Wells, Judge.

## IN UNITED STATES DISTRICT COURT

Equity. No. 1313

ADOLFO VALDES et al., Complainants,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico, Defendant

**Statement of Evidence**—Filed January 25, 1926

## CAPTION

Be it remembered, that this case came on for trial on the bill and answer before the Honorable Ira K. Wells, Judge of the District Court of the United States for Porto Rico, sitting at San Juan, Porto Rico, on the fourteenth day of October, 1925, complainants being represented by Henri Brown, Esq., and defendant by Mr. George C. Butte, Attorney General of Porto Rico, and J. A. Lopez Acosta, Esq., Assistant Attorney General.

Whereupon, the trial of the case was commenced and the following testimony produced and the proceedings had, as follows:

LUIS C. CUYAR, being called as a witness on behalf of the complainants, was duly sworn and testified as follows:

Direct examination by Mr. Brown:

I am a merchant residing in Miramar, San Juan, and a member of the firm of J. Ochoa & Hermano. The partners of that firm are Adolfo Valdes, Victor Ochoa, Pio Perez, Salvador Garcia and Luis Cuyar. I was born in Mayaguez, Porto Rico, and have always lived in Porto Rico. I am a [fol. 18] citizen of the United States. All of the partners of J. Ochoa & Hermano are managing partners.

ADOLFO VALDES, being called as a witness on behalf of complainants, was duly sworn and testified as follows:

Direct examination by Mr. Brown:

I reside in the Condado, San Juan, Porto Rico. I am a merchant, associated in business with others in the partnership J. Ochoa & Hermano. The other partners are Victor Ochoa, Pio Perez, Luis C. Cuyar and Salvador Garcia.

I was born in Spain and am a Spanish subject. I have always retained my Spanish citizenship. Pio Perez is a Spanish subject. He is at present in Spain.

Cross examination by Mr. Butte:

I know that Mr. Perez is a citizen of Spain because he was born in Spain and every once in a while he renews his card of Spanish citizenship in the office of the consul.

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SALVADOR GARCIA, being called as a witness for complainants, was duly sworn and testified as follows:

Direct examination by Mr. Brown:

My residence is San Juan, Porto Rico. I am a merchant, a member of the firm of J. Ochoa & Hermano. I was born in Spain and first came to Porto Rico in 1906. I am a Spanish subject.

The business of the partnership J. Ochoa & Hermano, of which I am a partner, is provisions, construction materials, soap, polish and other articles.

The articles sold by my firm are purchased in the United States and in Europe. We purchase cement in Europe and matches in Santo Domingo. My firm has been importing matches from Santo Domingo for about three years. They are imported in carton packages containing five gross each. We sell these matches in the same cartons in which they are imported. We do not open or break the cartons before selling the matches. They are sold in the same cartons in which they are imported. We pay excise taxes to the People of Porto Rico on these matches of twenty cents per gross and we have been paying that tax ever

since we have been importing matches. The excise tax law of 1925 does not change the rate on matches.

We import cement from Denmark in barrels and we sell it in the same barrels in which it is imported. During the last twelve months we imported twenty four thousand gross of matches from Santo Domingo. Last month we imported two thousand gross. We have already sold matches not yet imported.

Q. 1. How many gross of matches do you expect to import during this month and the next twelve months?

Mr. Butte: I think that question is improper.

The Court: I think that is problematical, Mr. Brown.

Q. 2. Have you any contracts or any plans for the importing of matches for the coming twelve months from Santo Domingo?

[This question objected to by defendant on the ground that such line of questioning is speculative and immaterial; that the Treasurer of Porto Rico is not trying to collect taxes for the next twelve months; and on the further ground that the jurisdiction of the court cannot be based on prospective and hypothetical sales which may or may not be made.

Objection overruled and defendant excepts.]

Q. 3. Based upon the demand for these matches among your customers and your sales in the last few months, how many matches do you expect to import during the coming twelve months?

A. We expect to sell an average of about two thousand gross per month.

We have been importing cement from Denmark for about three years. Our yearly sales have been about one hundred and thirty thousand odd dollars. We have orders outstanding for cement to be imported. For shipment this month we have ordered eight thousand barrels and for the coming month forty five hundred barrels. This cement should be received this month and the next month. During the next twelve months we expect to import more cement from Denmark than we did last year, a minimum of one thousand barrels more than forty five hundred monthly. We sell

[fol. 20] this cement at from \$2.95 to \$3.10 per barrel at the present time.

My firm filed the statement required by the sales tax law for the last ten days of August and paid the tax. In the sales so reported there were included sales of cement imported from Denmark. We also filed the statement for September sales.

We sell galvanized iron, iron rods for reinforcing, concrete, barbed wire, starch, ammonia, glass, brooms, lumber, rope, iron staples, hyrib, matches, paper, irons, paper bags, Paris green, oils, cement, bluing, candles and lime. We purchase the construction materials in the United States. Lime and brooms are manufactured in Porto Rico. We buy ammonia in the United States.

Excluding matches and cement our actual average sales of building materials are about five hundred and fifty thousand dollars.

We have regular customers who purchase these products from us. We have outstanding orders in the United States for construction materials for not less than seventy five thousand dollars. I believe that we will not import a less amount of building materials from Continental United States during the next twelve months than during the past twelve months, an amount which we will sell for five hundred and fifty thousand dollars. I cannot remember how long the firm of J. Ochoa & Hermano has been established. I have been with the firm since 1906. It was existing when I came here. We have a capital of five hundred thousand dollars invested in our business.

The margin of gross profit in complainants' sales of building materials such as lumber and iron rods is about 15 per cent; that is, the average difference between the purchase price and sale price is about 15 per cent. We sell iron reinforcing rods by the hundred pounds at different prices according to the thickness of the rods. The thickest, three fourths of an inch, are sold at three dollars and thirty cents per hundred pounds. The last lot received cost us three dollars and five cents, laid down in our warehouse, so that the gross profit on that class of rods would [fol. 21] be twenty five cents per hundred pounds. There may be occasions when we sell for a gross profit of ten or fifteen cents more per hundred pounds, and there are oc-

casions when we lose money. A fair average gross profit on wire rods is 15 per cent. In this profit no charges for overhead, storage, taxes, interest on money or anything of that kind are included, except hauling.

Assuming a sales price of three dollars and thirty cents per hundred pounds after paying the 2 per cent sales tax or 6.6 cents the profit would be very small. We have a general expense of 4 per cent for expenses of employees. It does not include cost of warehousing, interest on money invested or property taxes on materials.

The profit fluctuates a good deal on different building materials; for example, on galvanized iron the gross profit is only 5 or 6 per cent at most.

If we have to pay the two per cent tax on galvanized iron we will make almost nothing. The average interest rate on money in Porto Rico is between 8 and 9 per cent. Barbed wire costs us from three dollars ten cents to three dollars and fifteen cents per hundred pound roll and sells for about three dollars and thirty five cents, a gross profit of about 7 per cent on the cost price. Nails also bring a very small profit. They cost an average of three dollars and fifty cents to three dollars and fifty five cents per hundred pounds and are sold from three dollars and eighty cents to three dollars and ninety cents, a profit of from thirty to thirty-five cents. We pay rents for a warehouse and carry insurance. I think that if we deducted the two per cent sales tax there would remain a profit on construction materials of 6 per cent.

The newspaper *La Democracia* published an article a few days ago to the effect that the Treasurer states that he will prosecute with a strong hand anyone who violates the provisions of this law. I think this was a notice from the Treasurer himself. Besides on the book provided by the Government for noting down the sales monthly, there is a notice that a fine will be imposed of from one hundred dollars [fol. 22] to one thousand dollars upon any person violating the provisions of the law.

Cross examination by Mr. Butler:

All articles that we receive from the United States and elsewhere are our property when they get to Porto Rico. We do not carry on a retail business. A five gross carton

of matches is about three-fourths of a yard long and about one foot less in width. These cartons do not come in cases; they come loose. The carton is made of cardboard and there is no box around the cardboard. During the month of September, 1925, the average price at which we sold a carton of matches was 85 or 90 cents. We sold matches in September to nearly all our clients.

At the request of counsel for defendant the witness agreed to furnish a detailed statement of matches and cement sold during the last eleven days of August and the month of September, 1925, to be incorporated in the record as a part of his testimony.

We do not sell any cement at present, except that imported from Denmark. During the last eleven days of August or during the month of September we did not sell any cement except cement imported from Denmark. We made a report at the end of August of our sales for the last eleven days of August, 1925, and paid the tax. We made a report covering sales for the month of September, 1925, but are awaiting the result of this suit to see if we have to pay the taxes. According to this report we would have to pay for last month \$1,100 and some odd dollars figured at 2 per cent on the amount of sales made.

We have charged the two per cent provided by law to our customers, but we have not collected it because we sell at thirty and sixty days. Some of our customers have refused to pay this two per cent tax. We have collected the two per cent sales tax from some customers and paid the amount collectible for August but as regards the amount due for September we are awaiting the outcome of this case.

We usually sell on terms of sixty days and we have charged our customers on that basis, but we have not collected yet, except in a few small cases where we have sold for cash.

[fol. 23] Where we have sold for cash we hold the money awaiting the outcome of this case.

If we are compelled to pay we shall do so. We will try to collect from our customers. Some will accept it and some will refuse it. The Treasurer has not demanded of us directly the sales tax for the month of September, but he has published it in the papers and has stated that any merchant who refused to pay will be fined not less than one hundred dollars.

The note that appears in the book sold by the executive secretary, in which to note the amount of sales, is to that effect. I do not think that the Treasurer has demanded from us any sum on account of sales taxes for any other month after September, 1925.

Some time ago we used to receive cement in sacks.

Redirect examination by Mr. Brown:

About two years ago we received a lot of cement from Norway in sacks but for the last two years all of our cement has come in barrels. We have not opened the barrels to retail the cement. Sometimes we receive a broken barrel and the contents are removed but that is only in case the barrel is broken in unloading.

Some of our customers have refused to allow us to charge them the two per cent tax and some of the others have paid on the condition that if this law is held invalid then the amount is to be returned.

ARTURO GONZALEZ, being called as a witness on behalf of complainants, was duly sworn and testified as follows:

Direct examination by Mr. Brown:

I am cashier of J. Ochoa & Hermanos. I took the statement of the sales for the last eleven days of August, 1925, and paid the taxes due. I think some cement was included in the sale for the last days of August. The sworn statement of sales for September I sent by messenger in an envelope to the Treasurer of Porto Rico. The gross amount of sales reported was in excess of \$38,000.

I took the sworn affidavit relating to sales for the last eleven days of August to the Collector of Internal Revenue for San Juan. I went to buy the stamps to place them on the declaration to pay the tax. I said to the employee that [Vol. 24] I wanted to pay the tax under protest. He said that there I could only buy the stamps, and that as for the protest I could go to a department up in the Treasurer's office. I asked him for a receipt. He said that he could not give me a receipt, because they only sold stamps there. I then went to the place to which he directed me on the upper

floor near the Treasurer's office, to the employee in charge of that department, and I was informed that the matter of protest should be made to the Collector of Internal Revenue because that was where the payment of the tax was to be made. I returned to the collector's office, and as I noticed there was some confusion and that this matter did not seem to be understood, I requested to see Mr. Ponte personally, which I did, and he told me to write a letter stating that the payment was made under protest. It was then a bit late and he told me that I could send the letter later as a matter of personal favor to a friend.

I asked Mr. Ponte for a receipt, but he said a letter was sufficient. Later I wrote him a letter, the receipt of which he acknowledged.

I have no receipt for the payment of the tax because it was paid in stamps. There is no indorsement in the affidavit.

SALVADOR GARCIA was recalled by complainants and testified as follows:

Direct examination by Mr. Brown:

Victor Ochoa is a member of our firm. He has been a partner since the organization of the firm. At present he is in Spain. I have known him for more than twenty years. He is a Spanish citizen.

Cross examination by Mr. Butler:

The book that I referred to on my direct examination is like this and the threat to which you refer is the printing of Section 193 of the law on the second page of the book.

[The book is marked "Identification No. 1, Defendant,"]

I believe that my firm imported matches after August 30, 1925. I cannot state the exact amount, but I think the last importation was 200 packages.

[fol. 25] We have received no matches from the United States during this period.

We received and sold matches from the United States some years ago. More than a year ago we received and sold cement from the United States.

Redirect examination by Mr. Brown:

The only matches we have dealt in for several years last past are matches imported from Santo Domingo. We have only imported cement from Europe during the last two or three years.

Recross examination by Mr. Butte:

Twenty cents per gross should be paid on matches under the excise tax law. I cannot say exactly when the excise tax on our matches was paid. As to sales of matches under the new law since August 20, 1925, I do not know if the Treasurer has demanded payment of us of the excise tax. I believe they should have been paid, but I cannot now say if they have been. We have never made any protest as regards payment. I do not know whether in this last case any protest has been made.

#### EXHIBITS IN EVIDENCE

Statement Furnished by the Complainant as to Sales of Matches and Cement for the Last Eleven Days of August and the Month of September, 1925

Statistics of Dominican Matches Imported by J. Ochoa & Hermano from January 1, 1925, to October 16, 1925

See.	No. of		Price of article			
	Small	Large	in U. S.	Per	Margin	Apella
Habana	1, 225	000	0.000	0.00	1.00	1.00
Habana	1, 225	000	1.000	1.00	2.00	
Guantanamo	1, 225	000	2.000	2.00		2.00
Caribbean	1, 225	000	1.000	0.00		
Caribbean	1, 225	000	1.000	1.00	1.00	1.00
Caribbean	1, 225	000	1.000	1.00	1.00	1.00
Mari	1, 225	000	1.000	1.00	1.00	1.00
	1, 225	000	1.000	1.00	1.00	1.00

[fol. 26] Sales of Matches ex Shipment of 800 Cartons Arrived by S. S. Catherine August 14, 1925

## Arroyo:

	Cartons
August 14, M. Carrasquillo	50
" 15, G. Gran	200
" 15, M. Trujol	50
" 15, Fernando Beiro	50
	<hr/> 350

## Ponce:

August 15, A. Aguila Hijo & Co.	25
" 15, Fignerou & Santos	25
" 15, D. Serra & Co.	50
" 15, Tomas Moullet	25
October 2, Biaggi Hnos.	25
Unsold	25
	<hr/> 150

## Aguadilla:

August 15, V. Rivera S. en C.	20
" 15, J. C. Cabanillas & Hno.	50
" 15, Ramon Cubero	25
" 15, F. Sanchez Garcia	25
Sept. 4, Caridad Rosa	10
August 28, P. Gerena e Hijo	10
Sept. 30, V. Rivera, S. en C.	10
	<hr/> 150

## San Juan:

August 15, F. Freyre S. en C.	25
" 15, J. Ochoa & Hno. Almacén	125
	<hr/> 150
	<hr/> 800

Sales of Matches ex Shipment of 400 Cartons Arrived by  
S/S Mary October 2, 1925

San Juan:		Cartons
October 15, J. Ochoa & Hermano (Almacén)	1000	1000
[fol. 27] Poncá		
October 15, Amador Torres	50	
" 15, Cabrera Fernandez & Co.	25	
Unsold	25	
		1000
Arroyo:		
October 15, Miguel Trujol	50	
" 15, Fernando Beiro	50	
		1000
Aguadilla:		
October 15, Unsold	100	
		1000
		400

Statement of Dominican Matches Sold by J. Ochoa and  
Hermano from August 21st to October 10, 1925

		Cartons	
August	21, to Jose Burregui, Tou Alta	10	2
	22, to Herminio Sotjo, Vega Baja	20	4
	24, to Alejo Rosario Co., Cayey	10	4
	27, to Isabel Merced, Juncos	10	2
	28, to P. Gerena e Hijo, Aguadilla	50	10
	Total	100	20
Sept.	1, to Antonio Morillo, Santurce	5	1
	4, to Eduardo Santiago, Rio Grande	30	6
	4, to Caridad Rosa, Aguadilla	50	10
	5, Cash sale	20	4
	9, to Daniel Cheyres, Dorado	50	10
	9, to Aureliano Pelaez, Cayey	50	10
	9, to Martin Ramos, Cayey	25	5
	9, to Castrillon & Co., San Juan	15	3

Gross Cartons

	10, to Ramon Colon, Cayey	25	5
	10, to Eladio Alvarado, Cayey	25	5
	10, to J. Perez Caballero, Morovis	10	2
[fol. 28]			
Sept.	11, to Valiente & Co., Cotozal	100	20
	14, to Felix V. Lopez, Naguabo	20	4
	14, to J. Sanchez Garcia, Hato Puerto	5	1
	17, to Juan Cruz Nieves, Vieques	10	2
	22, to Lanza Rinculudo & Co., Cayey	5	1
	23, to Claudio Velazquez, San Lorenzo	10	2
	25, to J. Garrido & Hno., Caguas	5	5
	30, to A. Fernandez & Hno., San Juan	10	2
	30, to V. Rivera S. en C., Aguadilla	50	10
	Total	520	104
Oct.	2, to Bagger Hnos., Villalba	125	25
	8, to Isabel Merced, Jimcos	10	2
	8, to H. Alvarado, Cayey	25	5
	Total	160	32
Summary			
	Sales from August 21 to 31	100	20
	Sales during September	520	104
	Sales from October 1 to 10	160	32
	Total	780	156

Detailed Statement of Cement Sold by J. Ochoa y Hermano  
from August 20th to October 10, 1925

	Bols.	lbs.
August 20, to Nieves, Calafet & Co., Arroyo	1,500	
" Enes. de Tomas Cano & Co., Guayama	1,000	
" Cash Sale	2	
		2,502
21, to Barceloneta Fruit Co., Barceloneta	75	
" Manuel Egozenc, San Juan	20	

August 21, Suc. de S. Villamil & Co., San Juan 25

" Jose V. Figueron, Santurce 10

" Antonio Villegas, Caguas 35

[fol. 29]

August 21, to Mercedes de la Torre, Santurce 15

" Teodilo Llanas, Caguas 25

" Jose Rivero Chaves, Manati 65

" Rafael F. Veye, Rio Piedras 10

" Cash Sale 32

332

22, to Rafael F. Veye, Rio Piedras 20

" Mercedes de la Torre, Santurce 15

" Rafael F. Veye, Rio Piedras 40

" Arturo Bravo, San Lorenzo 20

" Antonio Villegas, Caguas 15

" Teodilo Llanas, Caguas 15

" Mercedes de la Torre, Santurce 10

" M. Fernandez Martinez, Rio Piedras 10

" Valiente & Co., Cotozal 10

" Victor M. Cott, Pta. de Tierra 5

" A. Suarez & Hno., San Juan 8

" Torres, Hernanz & Co., Santurce 50

" Cash Sale 155

433

24, to Valiente & Co., Cotozal 25

" Suc. de R. Villamil, Rio Grande 10

" M. Fernandez Martinez, Rio Piedras 10

" Martinez & Co., Utuado 25

" Agosto & Garcia, Catano 15

" A. H. Blascoechea, Santurce 5

" A. Suarez & Hno., San Juan 8

" Martinez, Higuera & Co., San Juan 25

" Suc. de Abreu, San Juan 5

" Jose Vela, Santurce 4

" Gimenez, Del Valle & Co., Santurce 20

" Antonio Villegas, Caguas 50

" Ramon Lloberas Soler, Santurce 15

" Garcia & Requena, San Juan 10

[fol. 30]

	1848.	1848.
August 24, to Balet & Recondo, Vega Alta	2	
" Cash Sale	17	
		246
25, to Marcial Blanco, Juncos	10	
" Agosto & Garcia, Catano	10	
" Agosto & Garcia, Catano	5	
" Ramon Carbia, San Juan	50	
" Manuel Egozcue, San Juan	15	
" R. Urgal, San Juan	1	
" Balet & Recondo, Vega Alta	10	
" Sobrinos de Sanchez & Co., Loiza	5	
" Pedro Moezo Bannet, Santurce	2	
" Balet & Recondo, Vega Alta	2	
" Cash Sale	106	
		246
26, to Sues de F. Pintueles & Co., Ciales	4	
" F. Fernandez Cienfuegos, San Juan	6	
" J. Perez Berclano, San Juan	50	
" Octaviano J. Herrera, San Juan	10	
" Francisco Fernandez Colon, Cayey	25	
" Luis Reyach, San Juan	50	
" Ledo. Sandalia Torres, Santurce	50	
" Asuncion Palacios Herrera, San Juan	25	
" Jose Rodriguez, Manati	50	
" Jose Rivero Chaves, Manati	50	
" Cash Sale	10	
		310
27 to Jose Urquiza, Juncos	2	
" Luis Seomane, Gurabo	3	
" J. Alvarez Garcia, Loiza	2	
" Sues de L. Villamil & Co., San Juan	20	
" Sues de L. Villamil & Co., San Juan	15	
" Finlay Wymouth & Lee, San Juan	6	
" Antonio Ribot, San Juan	4	
" Garcia & Requena, San Juan	10	

[fol. 31]

1848 Inds.

August	27, to Sues. de Forteza Hnos. & Co., Vega Baja	32	
"	Balet & Recondo, Vega Alta	4	
"	Sues. de Sanchez & Co., Comercio	20	
"	Serafin Falero, Juncos	30	
"	Cash Sales	28	
			176
	28, to Sues. de L. Villamil & Co., San Juan	15	
"	Serafin Falero, Juncos	25	
"	Pedro Moezo Banet, San Juan	25	
"	Jose F. Figueroa, Santurce	12	
"	Sues. de Sobrino & Co., Vega Baja	10	
"	Cash Sale	112	
			209
	29, to Jose Urquiza, Juncos	2	
"	Sues. de L. Villamil & Co., San Juan	20	
"	Agosto & Gatson, Catano	10	
"	Mercedes de la Torre, Santurce	15	
"	Mercedes de la Torre, Santurce	15	
"	Cash Sale	32	
			94
	31, to Thomas Agosto, Catano	8	
"	Jose Urquiza, Juncos	2	
"	Finlay, Waymouth & Lee, San Juan	25	
"	Antonio Villegas, Caguas	20	
"	Serafin Falero, Juncos	20	
"	Balet & Recondo, Vega Alta	12	
"	Arturo Buxo, San Lorenzo	15	
"	Sues. de Sobrino & Co., Vega Baja	9	
"	Finlay Waymouth & Lee, San Juan	25	
"	Cash Sales	39	
			265
Sept.	1, to Ramon Acevedo, Santurce	2	
"	Antonio Soto de Jesus, San Juan	10	
"	Finlay, Waymouth & Lee, San Juan	20	

[fol. 32]

		Bols.	Bols.
Sept.	1, to Garcia & Requena, San Juan	13	
	" Antonio Rios Valle, Rio Piedras	40	
	" Juan Allende, San Juan	13	
	" Finlay, Weymouth & Lee, San Juan	25	
	" Vicente Judice, San Juan	25	
	" Cash Sale	24	
			172
	2, to Sues. de F. Pintueles, Ciales	10	
	" The Juncos Central Corp., San Juan	175	
	" Verdejo & Cabañ, San Juan	13	
	" Mercedes de la Torre, Santurce	50	
	" Jose Dolores Cruz, Santurce	7	
	" Cash Sale	16	
			271
	3, to Antonio Carrasquillo, Gurabo	25	
	" Pedrosa, Catto & Co., Barrios	4	
	" Agosto & Garcia, Caguas	3	
	" Jose Diaz Carmona, San Juan	3	
	" Arrivi Hno., San Juan	1	
	" Jose Figueira, Santurce	15	
	" Cash Sale	22	
			73
	4, to Ramon Ruibal, Juncos	5	
	" Sues. de Jose Perez, San Juan	10	
	" Julio E. Alonzo, Canovanas	4	
	" E. M. Ellsworth, Cidra	6	
	" Cash Sale	22	
			47
	5, to Compania Azucarera del Ton, San Juan	60	
	" Manuel Egozcue, San Juan	20	
	" Sues. de Ramon Villamil, Rio Grande	10	
	" Santiago & Fernandez, Cidra	15	
	" Ramon Acevedo, Santurce	2	
	" Arturo Buxo, San Lorenzo	19	
	" Juan Allende, San Juan	20	

[fol. 33]

1945

1946

Sept.	5, to Antonio Soto de Jesus, San Juan	15	
	" Cash Sales	23	
			214
	8, to Pedro La Luz, Ciales	1	
	" Hotel Palace, San Juan	2	
	" Manuel Egozcue, San Juan	20	
	" Manuel Zenon, San Juan	13	
	" Vicente Judice, San Juan	25	
	" Francisco Rodriguez Perez, San Juan	30	
	" Manuel Santos Maysonet, San Juan	25	
	" Jose Rodriguez Fuentes, Santurce	30	
	" Garcia & Requena, San Juan	30	
	" Verdejo & Caban, San Juan	25	
	" Jose Dolores Cruz, Santurce	30	
	" J. Perez Beroncio, San Juan	21	
	" Agosto & Garcia, Caguas	10	
	" Sues. de L. Viland & Co., San Juan	5	
	" Cash Sale	25	
			320
	9, to Daniel Cheyres, Dorado	30	
	" Ramon Acevedo, Santurce	30	
	" Dr. M. Julia, San Juan	1	
	" Hotel Palace, San Juan	1	
	" J. Diaz Carmona, San Juan	1	
	" Manuel Egozcue, San Juan	20	
	" Manuel Egozcue, San Juan	20	
	" Ramon Acevedo, Santurce	60	
	" Asuncion Palacios, San Juan	25	
	" Jose Fernandez Vinas, Hato Rey	5	
	" Cash Sale	7	
			220
	10, to Antonio Carrasquillo, Gurabo	5	
	" M. Dorra & Co., Boca Vista	10	
	" Pedro A. de Castro, San Juan	11	
	" Agosto & Garcia, Caguas	2	

[fol. 34]

		Bbls.	Bbls.
Sept.	10, to Valentin Torres, Cidra .....	5	
	" Pedro A. de Castro, San Juan .....	200	
	" Cash Sale .....	10	
			240
	11, to Marcial Blanco, Juncos .....	30	
	" Comp. Popular de Transporte, Catano .....	6	
	" J. Alvarez Garcia, Loiza .....	1	
	" Valiente & Co., Corozal .....	10	
	" The Porto Rico Drug Co., San Juan .....	1	
	" Ramon Acevedo, Santurce .....	1	
	" Juan Calzada Gonzalez, Canovanas .....	15	
	" Cash Sale .....	35	
			99
	12, to Luis Seoane, Gurabo .....	5	
	" Ortega Hnos., Sucs., Santurce .....	5	
	" J. Fernandez Cienfuegos, San Juan .....	10	
	" Bureau of Supplies, San Juan .....	4	
	" Sucs. de Villar Sanchez & Co., San Juan .....	3	
	" Pedro A. de Castro, San Juan .....	200	
	" Jose V. Dominguez, Santurce .....	15	
	" Cash Sale .....	5	
			247
	14, to Carrasquillo, Gurabo .....	10	
	" Sariego & Fernandez, Cidra .....	10	
	" Cobian Solares & Co., Comerio .....	12	
	" J. Diaz Carmona, San Juan .....	1	
	" Hotel Palace, San Juan .....	2	
	" Mercedes de la Torre, Santurce .....	20	
	" Octaviano J. Herrera, San Juan .....	10	
	" Cash Sale .....	28	
			93
	15, to Pedro A. de Castro, San Juan .....	10	
	" Luis Rexach, San Juan .....	20	
	" Bureau of Supplies & Print., San Juan .....	5	
			35

3- Rec.

[fol. 35]

		Reis.	Reis.
Sept	16, to Cash Sale		10
	17, to Emilio Quinones, San Juan	10	
	" Jose V. Dominguez, Santurce	15	
	" Comp. Popular de Transporte, Catano	12	
	" A. Sanchez Frasieris, Santurce	5	
	" Rafael Torres, Morovis	2	
	" M. Fernandez Martinez, Rio Piedras	8	
	" Cash Sale	65	
			117
	18, to Mercedes T. de Nevarez, San turce	7	
	" Vicente Judice, San Juan	30	
	" J. Mulero & Hno., Juncos	30	
	" Manuel Zenon, San Juan	10	
	" Jose Dolores Cruz, San Juan	30	
	" Antonio Rios Valle, Rio Piedras	25	
			152
	19, to Antonio Soto de Jesus, San Juan	5	
	" Luis Rexach, Santurce	5	
			10
	21, to Antonio Villegas, Caguas	25	
	" Luis Rexach, San Juan	20	
	" Guillermo Suarez, San Juan	1	
	" Hotel Palace, San Juan	2	
	" M. Ruiz Soler, San Juan	3	
	" Cash Sale	17	
			68
	22, to E. Sole & Co., San Juan	25	
	" J. Mulero & Co., Juncos	20	
	" J. Calzada Gonzales, Canovanas	8	
	" Victor M. Cott, Pta. de Tierra	2	
	" Jose M. Lopez	1	
	" Central Vannina, San Juan	15	
	" Cash Sale	15	
			86

[fol. 36]

Bols. Bols.

Sept.	23, to Balet & Recondo, Vega Alta	3	
"	" Mercedes T. de Navarez, Santurce	5	
"	" Teodulo Llamas, Caguas	30	
"	" Asuncion Palacios, San Juan	20	
"	" Teodulo Llamas, Caguas	30	
"	" Antonio Villegas, Caguas	30	
"	" Luis Rexach, San Juan	10	
"	" R. A. Day Plantation, Manati	3	
"	" Francisco Buxo, San Lorenzo	8	
"	" Cash Sale	26	
			165
	24, to Juan Palacios Rodriguez, San Lorenzo	5	
"	" Luis Rexach, San Juan	5	
"	" Ramon Acevedo, Santurce	15	
"	" Marcial Blanco, Juncos	37	
"	" Jaime Padro, San Juan	5	
"	" Cash Sale	9	
			76
	25, to The Juncos Central Co., San Juan	85	
"	" The Juncos Central Co., San Juan	8	
"	" A. Sanchez Frasqueris, Santurce	5	
"	" E. Sole & Co., San Juan	20	
"	" Verdejo & Caban, San Juan	10	
"	" Cash Sale	6	
			134
	26, to A. Sanchez Frasqueri, Santurce	5	
"	" Francisco Rodriguez Perez, San Juan	20	
"	" Antonio Soto de Jesus, San Juan	10	
"	" Balet & Recondo, Vega Alto	10	
"	" Francisco Fernandez Garcia, Cayey	25	
"	" Cash Sales	2	
			72
	28, to Luis Rexach, San Juan	10	
"	" Luis Nieves, Ciales	1	
			11

[fol. 37]

		Bols.	Bols.
Oct.	5, to Luis Rexach, San Juan .....	20	
"	" Luis Rexach, San Juan .....	20	
"	" Ramon Acevedo, Santurce .....	50	
"	" Rafael Nevares, Toa Baja .....	25	
"	" Jose E. Moreda, San Juan .....	25	
"	" Ramon Acevedo, Santurce .....	25	
"	" Sues. de Pintuelas & Co., Ciales .....	5	
"	" Manuel Velilla, Santurce .....	6	
"	" Sues. de L. Villamil & Co., San Juan .....	50	
"	" Manuel Vinas, Santurce .....	10	
"	" Cash Sales .....	60	
			296
	6, to M. Santos Maysonet, San Juan .....	10	
"	" Juan Calzada Gonzalez, Caguas .....	10	
"	" Manuel Carreras, Santurce .....	1	
"	" J. Mulero & Hno., Juncos .....	35	
"	" Fernando Alvarez, Catano .....	6	
"	" Sues. de L. Villamil & Co., San Juan .....	1	
"	" Sues. de L. Villamil & Co., San Juan .....	3	
"	" Finlay, Waymouth & Lee, San Juan .....	30	
"	" Cash Sale .....	26	
			122
	7, to Mercedes T. de Nevarez, Santurce .....	10	
"	" M. Santos Maysonet, San Juan .....	4	
"	" A. Rios Valle, San Juan .....	21	
"	" Vicente Judice, San Juan .....	25	
"	" Manuel Zenon, San Juan .....	13	
"	" A. Soto de Jesus, San Juan .....	8	
"	" Antonio Arbona, San Juan .....	12	
"	" O. J. Herrera, San Juan .....	13	
"	" Garcia & Resquena, San Juan .....	25	
"	" Antonio Arbona, San Juan .....	4	
"	" J. Hernandez & Hnos., Santurce .....	50	
"	" Ramon Acevedo, Santurce .....	25	

[fol. 38]

		Bols.	Bols.
Oct.	7, to W. F. Lippit, San Juan	12	
	" Cash Sale	46	
			268
	8, to Luis Rexach, San Juan	10	
	" Ramon Acevedo, Santurce	4	
	" J. Rodriguez Fuentes, Santurce	25	
	" Asuncion Palacios, San Juan	25	
	" Agosto & Garcia, Catano	9	
	" E. S. Hutton, San Juan	30	
	" Eduardo Valladares, Humacao	1,000	
	" Suc. de Tomas Cano & Co., Guayama	1,000	
	" Cash Sale	55	
			2,158
	9, to Luis Rexach, San Juan	20	
	" Rafael F. Veve, Rio Piedras	10	
	" Ramon Acevedo, Santurce	10	
	" Manuela R. de la Cruz, Santurce	2	
	" Jose D. Cruz, Santurce	10	
	" Rafael F. Veve, Rio Piedras	7	
	" Rafael F. Veve, Rio Piedras	36	
	" Rafael F. Veve, Rio Piedras	19	
	" Luis Cabrera, Comerio	10	
	" Union Club, Santurce	8	
	" Valiente & Co., Corozal	10	
	" Cash Sale	46	
			188
	10, to Sandalio T. Monge, Santurce	10	
	" Agosto & Garcia, Catano	5	
	" Tomas Agosto, Catano	8	
	" Martorell & Co., Charles	10	
	" Etienne Totti, San Juan	50	
	" M. Fernandez, San Juan	4	
	" Cash Sale	15	
			102
	Total		10,790

[Vol. 39] WILLIAM AMY, being called as a witness on behalf of defendant, was duly sworn and testified as follows:

Direct examination by Mr. Lopez Acosta:

I am chief of the Bureau of Internal Revenue. I have made no examination as to the payment made by J. Ochoa & Hermano on matches since August 20, 1925. I am not positive whether this firm paid excise taxes on matches before they were sold, but it would be contrary to the instructions of the department if payment was demanded before the matches were sold.

Under the new law, and according to the instructions issued by the finance department, no payment of any excise tax on taxable articles is demanded until the article has been sold.

I am not positive, but I do not think that J. Ochoa & Hermano have paid any excise tax on matches since August 20, 1925. No special demand for the payment of excise taxes due on matches since August 20, 1925, has been made.

Cross examination by Mr. Brown:

The tax rate per gross of matches is the same under the present law as it was under the old law. The rate is the same but the method of collection is different. Section 33 of the old law gave the merchant the option of paying the tax before the article was sold or after the article was sold. There is no such option in the present law. Both the old and the new law provide that the tax must be paid on the sale of the article. I could not say whether under the old law the tax was ordinarily collected on the article before sale. It was the first duty of the internal revenue agent to see that the merchandise was duly entered on the books of the department so that when the sale was made payment of the tax would be made. I am quite positive that the tax was not paid before the sale of the article. I am not sure whether under the old law Ochoa generally paid the tax on matches before selling. The instructions to revenue agents and employees that the tax should not be collected until the sale was made were issued shortly after the new law went into effect. Before the instructions were issued no demand or threat was made against the merchant if he

[fol. 40] did not want to pay until after the sale was made. I do not know whether J. Ochoa & Hermano have paid anything on matches since August 20, 1925.

**Redirect examination by Mr. Lopez Acosta:**

The information that we obtained from the custom house is for the purpose of identification only. I have no knowledge that a demand has been made on merchants, under the new law, to pay the tax on these articles before they are sold, and I have received no complaints from merchants in that regard.

**Recross examination by Mr. Brown:**

I have given no instructions to the merchants as to the payment of the sales tax. The law tells them what to do. Any person who has not rendered a statement between the first and the fifteenth of the succeeding month has been visited by internal revenue agents and requested to state why he has not sent in his statement.

The department is requiring the two per cent sales tax to be paid only on the first sale. The law states that the two per cent tax is to be paid according to Section 62. It does not say that it should be collected every time the same is made. So we place it on the first sale. The law does not specify on what particular sale the tax should be placed. If we wanted to place it on the last sale I suppose we could do so, but I do not think we could exempt the first sale.

Page two of the official book for making sales tax returns marked "Identification No. 1" and which was shown complainants' witness Garcia was introduced in evidence by defendant, and is in words and figures as follows:

"Section 103. Whenever this Act provides that the commission of certain acts constitutes a misdemeanor and no penalty is specifically prescribed, the accused shall be sentenced to a fine of not less than one hundred (100) nor more than one thousand (1,000) dollars or to confinement in jail for a term of not less thirty (30) days or more than one year, and for the second and each subsequent offense, both penalties, fine and imprisonment, shall be imposed."

[fol. 41] Defendant offered in evidence certified copies of the sworn declarations of sales filed by the complainants in the office of the Treasurer, for the months of August, 1925, and September, 1925.

These documents were admitted in evidence and marked "Defendants' Exhibits A 1" and "A 2," and are in words and figures, as follows:

#### EXHIBIT A 1, DEFENDANT

SAN JUAN, P. R. J. Ochoa Hno. Folio No. 3853. Comercio  
# 1 and 3

#### Declaration of Sales, Month of August, 1925

Month	Day	Value
	1. I, Juan G. Gallardo, Treasurer of	
	2. Porto Rico, do hereby certify that	
	3. this is a true and correct copy of the	
	4. declaration of sales rendered by the	
	5. firm of J. Ochoa Hno., covering Au-	
	6. gust 20th to 21st, inclusive and sub-	
	7. ject to the 2% sales tax prescribed	
	8. Section 62, Act 85, approved Au-	
	9. gust 20th, 1925.	
	10. Juan G. Gallardo, Treasurer.	
	11.	
	12.	
	13.	
	14.	
	15.	
	16.	
	17.	
	18.	
	19.	
August,	20. Total sale to day	\$2,497 16
	21.	3,249 24
	22.	2,358 21
	23.	

Month	Day	Value
August	24,	2,533 88
	25,	2,709 33
[fol. 42]	26,	3,590 82
	27,	2,431 08
	28,	3,253 27
	29,	2,489 16
	30,	
	31,	2,537 20

Total of all Sales \$27,649 35

[On margin: Affix and cancel hereon the necessary Int. Rev. stamps to cover the amount required.]

Int. Rev. Stamps in the amount of \$552.99 have been affixed and cancelled on the original hereof.

Liquidation \$27,649.35 at 2% — \$552.99.]

#### Oath

I, Arturo Gonzalez, duly sworn certify: that the foregoing statement contains a complete and correct account and the true prices applying to all the sales made by cash and on credit during the month of August and that the affixed stamps hereon cancelled represent the tax I must pay the Government in accordance with Section 62 of the Int. Rev. Law of 1925.

J. Ochoa Hermano by Arturo Gonzalez, Taxpayer,  
or His or Her Agent.

Sworn and subscribed before me, the 10th day of  
Sept. 1925. Signature of subscriber: E. Vissepo;  
official title: Int. Rev. Agent.

(Affix here a 25c stamp.)

[A 25c Int. Rev. Stamp cancelled hereon.]

[fol. 43]

## EXHIBIT A 2, DEFENDANT

San Juan, P. R. J. Ochoa Hno. Folio No. 3854. Comercio Nos. 1 and 3

## Declaration of Sales, Month of September, 1925

Month	Day	Value
Sept.	1. Total sale today	\$2,567 50
	2.	2,620 99
	3. I, Juan G. Gallardo, Treasurer of	2,591 61
	4. Porto Rico, do hereby certify that this	1,124 27
	5. is a true and correct copy of the declaration of sales rendered by the firm of	1,833 30
	6. J. Ochoa Hno. covering September 1st	
	7. to 30th, inclusive and subject to the 2% sales tax prescribed by section 62 Act	3,076 56
	8. No. 85, approved August 20th, 1925.	3,577 90
	9. Juan G. Gallardo, Treasurer.	4,261 26
	10.	3,622 47
	11.	883 58
	12.	
	13.	
	14.	2,119 40
	15.	2,251 78
	16.	2,293 57
	17.	4,375 49
	18.	3,197 73
	19.	1,471 92
	20.	
	21.	1,791 60
	22.	1,687 55
	23.	2,509 92
	24.	2,051 86
	25.	2,469 69
	26.	1,119 76
	27.	
	28.	1,126 50
	29.	2,915 99
[fol. 44]	30.	
	31.	1,123 16
Total of all sales		\$58,664 46

[On margin: Affix and cancel hereon the necessary Int. Rev. Stamps to cover the amount required.

Liquidation \$58,664.46 at 2% — \$1,173.29.]

### Oath

I, Adolfo Valdez, duly sworn, certify: that the foregoing statement contains a complete and correct account and the true prices applying to all sales made by cash and on credit during the month of September.

J. Ochoa & Hno., by A. Valdez, taxpayer, His or Her Agent.

(Affix here a 25 cent stamp.)

Sworn and subscribed before me this tenth day of October, 1925. Signature of subscriber: Fernando B. Fornaris; Official title: Notary Public.

[A 25 cent Int. Rev. Stamp cancelled hereon.]

Aff. No. 1266.

It is hereby stipulated and agreed that the above statement of evidence is a true and accurate statement of the evidence taken at the trial of this case.

Henri Brown, Solicitor for Complainants. George C. Butte, Solicitor for Defendant.

### JUDGE'S CERTIFICATE TO STATEMENT OF EVIDENCE

The above statement of evidence is hereby by consent approved as a true and accurate statement of the evidence taken at the hearing of this case.

Jan. 25, 1926.

Ira K. Wells, District Judge.

ORDINOS—January 8, 1926

WELLS, J.:

The complainants are co-partners, doing business under the firm name and style of J. Ochoa y Hno., and are all subjects of the King of Spain residing in Porto Rico, with the exception of Luis C. Cuyar, who is a citizen of the United States, residing and domiciled in the Island of Porto Rico.

The defendant, Juan G. Gallardo, is the duly qualified and acting Treasurer of Porto Rico, of which he is a resident and in which he is domiciled.

The complainants are now and have been for many years engaged in the business of selling provisions, building material, supplies and other merchandise at wholesale in the City of San Juan, Porto Rico. The complainants purchase and import from the continental United States and from foreign countries all the articles sold by them in their business. They import cement from Denmark, which they sell in the original barrels in which the same is imported, and they also import matches from Santo Domingo, which they also sell in their original packages.

The articles imported and sold by said complainants are subject to the Internal Revenue Law of Porto Rico passed by the 1925 Legislature.

This is a bill in equity to enjoin the enforcement, as against the complainants, of the Internal Revenue Law enacted by the Legislature of Porto Rico and approved by the Governor on August 29, 1925. The bill is founded upon allegations that the enforcement of the law and taxes imposed thereby would violate the due process and equal protection clauses of the Fourteenth Amendment and the commerce clause to the Constitution of the United States and also the Organic Act of Porto Rico. It alleges discrimination [fol. 46] tions against imports from the United States and from foreign countries in favor of domestic products and manufacturers and to unlawfully burden foreign and interstate commerce. It is also claimed that apart from interference with commerce, foreign and interstate, the taxes imposed by the law violate the principles of uniformity pre-

scribed by the Organic Act of Porto Rico and impose unequal burdens on members of the same class and that the taxes are confiscatory.

Act number 85 of the Laws of Porto Rico of 1925, approved August 20, 1925, is entitled "An act to provide revenues for the People of Porto Rico by levying certain sales tax and taxes for the manufacturers' use, sale and consumption of certain excise and license taxes on certain occupations, industries or businesses; to impose certain penalties; to repeal the laws in force providing for excise and license taxes, and for other purposes."

This law is known as the Internal Revenue Law of Porto Rico and is divided into several headings and titles, as follows:

Title I, Definitions.

Title II, Excise Taxes.

Title III, Sales Taxes.

Title IV, License Taxes.

Title V, Administrative Provisions.

Title VI, Judicial and Administrative Provisions.

Title VII, General Duties of Employees of the Department of Finance in connection with the Internal Revenue Law.

This is an attack upon that part of this law designated "Excise Taxes", which is dealt with in Title II of the Act, and the other denominated "Sales Taxes", which is dealt with in Title III of the Act.

The material sections of Title II, involving excise taxes, [fol. 47] are as follows:

"Section 16. There shall be collected and paid, once only, an internal revenue tax on each of the following articles."

Then follows a list of 44 articles, including such things as alcohol, cigars, playing cards, matches, pianos, billiard tables, etc., and on "production, manufacture, sale, use or consumption in Porto Rico" on which varying taxes are laid. These taxes are invariably laid upon the sale, production, manufacture, use, transfer or consumption of the articles. Some of the taxes are levied on a quantitative basis, and some on an *ad valorem* basis.

Section 4 of the law defines the phrase "ad valorem" as follows:

"For the purposes of this Act, the phrase 'ad valorem' shall be construed to mean the cost of the article when in possession of the person, plus a reasonable profit to be estimated at ten per cent (10%) of said cost, if such person fails to prove, to the satisfaction of the Treasurer of Porto Rico, that the profit obtained on such articles is less than the aforesaid percentage: Provided, That the word 'person' as used in this section shall have the meaning given thereto in section 5 of this Act."

The word "person" is defined in Section 5 to include not only the natural persons and all manufacturers or dealers, but also the partnership, associations of all classes, limited liability joint stock companies, companies, corporations or any other artificial person.

Section 37 of the law provides:

"Dealers shall be liable for the payment of the tax upon selling or transferring the taxable article to another dealer or to a consumer."

Section 38 provides:

"The consumer shall be liable for the payment of the tax upon coming into possession of the taxable article for use or consumption in Porto Rico."

[fol. 48] "Section 39. Taxes prescribed by this Act on the sale, transfer, use or consumption in Porto Rico of articles comprised in section 16 shall be paid by the dealer upon selling or transferring the taxable article to another dealer or to a consumer."

The material sections of Title III, involving sales taxes, are as follows:

"Section 62. There shall be levied and collected on the sale of any article, the object of commerce not specified in section 16 of this Act or exempted from taxation as provided in said section, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sales."

And Section 83, relating to exemptions, provides:

"Any person comprised within the provisions of Section 62 of this Act, except manufacturers whose total monthly sales do not exceed one hundred (100) dollars, shall be exempt from the payment of the tax specified in said section; Provided, That when one person alone shall have several businesses, under separate accounts, the amounts of the monthly sales of these should together amount to less than one hundred (100) dollars so as to be comprised within the exemption hereby established; Provided, further, That the tax provided by Section 62 of this Act shall not attach to (1) food stuffs; (2) fluid gas; (3) electric current; (4) fertilizers, as well as all raw materials used in the manufacture of fertilizers; (5) charcoal and wood; (6) jewels and precious and semi-precious stones; (7) the sales made by agriculturists of their crops and live stock; (8) the sale of newspaper, to newspaper advertisements and literary, scientific and philosophical works and to public school text books."

The defendant Treasurer construes Section 62 of this Act covering the "Sales Taxes" as applying only to the first [fol. 49] sale in Porto Rico and not as to any subsequent sales.

#### Jurisdictional Amount

This is a suit for injunction and the amount in controversy is determined by the value to the complainants of the right which they assert in good faith and is the subject of the bill, or the value to the complainants of the rights for which they pray protection, which in this case the court holds to be in excess of the sum of three thousand dollars.

#### Equitable Jurisdiction

It has been uniformly held that the illegality or unconstitutionality of a state or municipal tax is not of itself a ground for equitable relief in the courts of the United States. I do not believe that any irreparable damages have been shown in this case. The damage which the complainants would suffer, as is shown by a fair consideration of all the testimony, is the amount of the supposed illegal tax

which they would have to pay. The result of the evidence in this case is that the complainants rely solely upon the supposed invalidity of this law.

This is a suit for an injunction to restrain the defendant Treasurer from collecting from complainants a tax which complainants have already collected in part from their customers and which money they now have in their own pockets and which was collected from their customers solely and alone by reason of the tax in question, and the complainants are now seeking to enjoin the defendant Treasurer from collecting this tax. They have collected a part of this tax from their customers and are attempting to collect it in every instance, but yet are refusing to pay it, or any part of it, to the Government, under whose law they represent to their customers they are collecting it. They now come into this court and ask this court to protect them in withholding from the Government of Porto Rico money collected by them from their customers under this tax law which they are seeking to evade.

They are virtually saying to the Government of Porto Rico, here, we have collected part of this tax which we are compelled to pay under this law from our customers, by [fol. 50] reason of their belief that we must pay it to the Government of Porto Rico, yet now that we have this money expressly paid to us by reason of this tax and for that express purpose, we will keep the same in our pockets and not pay it to you because we think that you have no right to collect it from us. That the money we have collected from our customers and will collect in the future, by reason of this tax, under the belief of our customers that the same was to be paid to the People of Porto Rico, we will keep in our pockets. The complainants treat this law as valid when it comes to collecting the tax from their customers and invalid when it comes to paying it to the Government. They are attempting to blow hot and blow cold at the same time. He who comes into equity must come with clean hands. It is the universal rule that equity courts will not interpose to suitors who show a lack of equitable dealing in the same subject matter.

A court of equity endeavors to enforce the doctrine of good faith and good conscience upon the defendant, but not in favor of any complainant who has himself acted outside of good conscience and good faith. He who seeks equity

must do equity. Can it be said that it is equitable for the complainants to collect this tax, about which they are complaining, from their customers and then refuse to pay the same to the Government on the ground that it is illegal and unjust.

In the examination of Mr. Salvador Garcia, one of the complainants in this case (record, pages 37-38), he testifies as follows:

Q. Did you, during the month of September, 1925, collect from the purchasers to whom you sold any goods the two per cent sales tax?

A. We have charged the two per cent provided by the law, but we have not collected it because we sell at thirty and sixty days. Some customers have refused to pay this two per cent tax.

Q. Have you ever collected from any customer the two per cent sales tax?

A. We have collected from some customers.

[fol. 51] Q. But your did not pay it to the Treasurer, did you?

A. We paid the amount collectible in the month of August, but as regards the amount due for September, we are awaiting the outcome of this case.

Q. So that the two per cent that you have collected from your customers during the month of September, 1925, is in your hands awaiting the outcome of this suit, is it?

Mr. Brown: He has not testified that he has collected the September tax.

A. We usually sell on terms of sixty days and we have charged our customers on that basis, but we have not collected yet, except in a few small cases where we have sold for cash.

Q. And where you sold for cash you still hold the money, do you?

A. Yes, we have the money awaiting the outcome of this case.

Q. And the two per cent which you have charged against your customers, who have thirty or sixty days' bills, also depends upon the outcome of this suit. Is that correct?

A. If we are compelled to pay we shall do so.

which they would have to pay. The result of the evidence in this case is that the complainants rely solely upon the supposed invalidity of this law.

This is a suit for an injunction to restrain the defendant Treasurer from collecting from complainants a tax which complainants have already collected in part from their customers and which money they now have in their own pockets and which was collected from their customers solely and alone by reason of the tax in question, and the complainants are now seeking to enjoin the defendant Treasurer from collecting this tax. They have collected a part of this tax from their customers and are attempting to collect it in every instance, but yet are refusing to pay it, or any part of it, to the Government, under whose law they represent to their customers they are collecting it. They now come into this court and ask this court to protect them in withholding from the Government of Porto Rico money collected by them from their customers under this tax law which they are seeking to evade.

They are virtually saying to the Government of Porto Rico, here, we have collected part of this tax which we are compelled to pay under this law from our customers, by [fol. 50] reason of their belief that we must pay it to the Government of Porto Rico, yet now that we have this money expressly paid to us by reason of this tax and for that express purpose, we will keep the same in our pockets and not pay it to you because we think that you have no right to collect it from us. That the money we have collected from our customers and will collect in the future, by reason of this tax, under the belief of our customers that the same was to be paid to the People of Porto Rico, we will keep in our pockets. The complainants treat this law as valid when it comes to collecting the tax from their customers and invalid when it comes to paying it to the Government. They are attempting to blow hot and blow cold at the same time. He who comes into equity must come with clean hands. It is the universal rule that equity courts will not interpose to suitors who show a lack of equitable dealing in the same subject matter.

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A. We usually sell on terms of sixty days and we have charged our customers on that basis, but we have not collected yet, except in a few small cases where we have sold for cash.

Q. And where you sold for cash you still hold the money, do you?

A. Yes, we have the money awaiting the outcome of this case.

Q. And the two per cent which you have charged against your customers, who have thirty or sixty days' bills, also depends upon the outcome of this suit. Is that correct?

A. If we are compelled to pay we shall do so.

Q. And if you are compelled to pay you will charge the two per cent against your customers?

A. Some of them will accept it and some of them will refuse it.

Q. But you will try to collect it from your customers?

A. Yes."

### Adequate Remedy at Law

Does the law of June 3rd, 1924, as amended August 20th, 1925, provide an adequate remedy at law?

Sections I and II of Act number 9 of the Special Session of the Porto Rico Legislature, 1924, provides:

"Section 1. Whenever a taxpayer believes that he should not pay a tax or part thereof because he understands that it is illegal, excessive or wrongful, he shall, however, have the obligation to pay the same in full upon request of the collector of taxes of his district, or of the official in charge of the collection of taxes, and shall ask the said collector or the said official in charge of the collection of taxes, should he desire to make any claim, to endorse the tax receipt [sic] specifically stating whether the said protest refers to the whole or to a part of the tax paid under protest, and setting forth the exact amount protested. The said endorsement shall be signed by the taxpayer and by the collector or officer in charge of the collection of taxes.

Section 2. After payment is made, the collector of taxes or the official in charge of the collection of taxes, shall cover the sum collected into the Treasury of Porto Rico, reporting to the Treasurer the total amount of the tax, as well as the part thereof paid under protest."

Sections III and IV of said Act of 1924 were amended by law number 84, of the Legislature of Porto Rico, 1925, to read as follows:

"Section 3. The moment that a tax paid under protest is received, the part thereof not protested, if there be any, shall be considered as all other receipts from taxes, the amount of which is to be applied to the obligations of the Insular Government, and in the case of property taxes, the part of said tax pertaining to the respective municipalities,

pursuant to law, shall be paid over to them. The protested part shall be paid covered into a special fund to be known as 'Taxes Paid Under Protest—Trust Fund,' to be there held until the final decision of a court of justice is rendered upon the legality of the collection of the taxes so protested, and likewise interest at the rate of six (6) per cent on the protested part shall be covered monthly into the said trust fund, taking the sum necessary therefor out of such moneys as may be available in the Treasury of Porto Rico, for which purpose the Treasurer of Porto Rico is hereby authorized and empowered to dispose of such moneys in the Treasury of Port Rico.

"Section 4. A taxpayer who shall have paid under protest the whole or part of any tax shall, within a term of not to exceed thirty days from and after the date of payment, sue the Treasurer of Porto Rico in a court of competent jurisdiction, to secure the return of the amount [fol. 53] protested, and summons shall be served on the Treasurer of Porto Rico and the Attorney General within thirty days after the time of filing such suit. If the said summons be not effected within the aforesaid term of thirty days the plaintiff's suit shall be held to be dismissed and the court shall render judgment of dismissal with prejudice as between the parties. The Attorney General, or a person designated by him, shall represent the Treasurer of Porto Rico in such suits. When any case is ready for trial the court shall set a day for the trial thereof without waiting for the parties to ask for it.

"When final decision is rendered, if favorable to the taxpayer, the Treasurer of Porto Rico shall proceed to return to him the amount directed in the decision, to be charged against the fund 'Taxes Paid Under Protest—Trust Fund,' referred to in section 3 hereof, plus interest on such amount, at the rate of six (6) per cent a year, to be computed from the date on which payment under protest was made to the date on which actual return is made by the Treasurer to the taxpayer of the amount directed by the court to be returned.

"If the decision be favorable to The People of Porto Rico, the Treasurer shall cover from the fund known as 'Taxes Paid Under Protest—Trust Fund,' into the proper

fund, the tax directed by the court in its decision, turning over to the respective municipality the proportion established by law in cases of property taxes."

I believe that this law covers the payment of all taxes and that the same applies to all parts of the Internal Revenue Law of 1925.

The law for the payment of taxes under protest was amended by the 1925 Legislature to cure the defects pointed out in the case of *West India Oil Company v. Gallardo*, by the Circuit Court of Appeals in their decision.

The new act seems clear and unambiguous, and is expressly devoted to the payment of taxes under protest, and I believe it provides a plain and adequate remedy at law.

Complainants claim that this law is void because both [fol. 54] "Excise" and "Sales" taxes on sales of imports by importers in original packages are an unlawful burden upon foreign and interstate commerce.

The evidence in this case is that the complainants import cement from Denmark which is sold by them in the original barrels in which it is received, and matches from Santo Domingo which are sold by them in the original cartons in which they are imported. Both the cement and matches are received by the complainants at the dock in San Juan, Porto Rico, as their property, taken by them to their store and warehouse, and mingled with their other property and becomes a part of the stock with which they do business.

When the cement and matches are received by the complainants at the dock and taken by them to their warehouse as their property, the same is at rest and becomes part of their stock in trade.

I am satisfied that this law is not a burden upon, or even a regulation of, foreign or interstate commerce.

The law as laid down by the United States Supreme Court in *Sonneborn Bros. v. Cureton* Attorney General, 262 U. S. 506, is applicable to this case.

In this decision the Supreme Court by Chief Justice Taft, page 508, say:

"The question we have to decide is whether oil transported by appellants from New York or elsewhere outside

of Texas to their warehouses or warehouse in Texas, there held for sales in Texas in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sales and delivered in Texas.

Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to [fol. 55] do business as wholesale dealers in the State. The interstate transportation was at an end and whether in the original packages or not, a state tax upon the oil as property or upon its sale in the State, if one state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

The next contention of the complainants is that the "Sales Tax" law as construed and enforced by defendant discriminates unlawfully against non-domestic manufacturers and products and the *ad valorem* "Excise" on products that are produced or manufactured in Porto Rico as well as imported from the continental United States, likewise discriminated unlawfully against the non domestic product or manufacture, and that said Act is void for repugnancy to the Constitution of the United States and the uniformity clause of the Organic Act.

This is a tax upon the sale of articles imported into Porto Rico as well as articles produced and manufactured in Porto Rico. The sales tax rate in both instances is two per cent. The defendant Treasurer construes this as imposing the tax upon the first sale of each article in Porto Rico. The complainants insist that this works a discrimination in favor of articles manufactured in Porto Rico. That the tax on articles manufactured in Porto Rico is fixed upon the manufacturer's or producer's sale price, while on imported articles the tax is fixed upon the importer's sales price, and that in case of imported articles that the taxable value of the articles include two elements of value not in-

cluded in articles produced or manufactured in Porto Rico, namely, the cost of transportation and the importer's profit.

So far as discrimination between articles is concerned, the shifting and changing rise and fall in popularity and public favor will always change the price of articles, and hence the difference in amount of sales tax levied upon the selling price. Where the rate is uniform, as I think it is in this law, I cannot see how these factors can be claimed as an illegal discrimination. The uniformity required in taxes [fol. 56] is the uniformity of application to a class under consideration, and not uniformity in final result. A tax act is not unconstitutional because of inequality in operation, owing to different local conditions.

*Flint v. Stone Tracy Co.*, 200 U. S. 107.

In an opinion handed down by the Supreme Court of the United States on April 13, 1925, in the case of *Stebbins v. Riley*, Vol. 268, Supreme Court Reports, 137, in considering the California Inheritance Tax Law of 1917, Mr. Justice Stone who handed down the opinion of the court says:

"The guarantee of the Fourteenth Amendment of the equal protection of the laws is not a guarantee of equality of operation or application of state legislation upon all citizens of a State. As was said in *Magoon v. Illinois Trust & Savings Bank*, *supra*, at page 293:

"It only prescribes that that law have the attribute of equality of operation and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may . . . In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion." *Id.* page 142."

There is no tax upon the article itself but only upon the privilege of doing certain acts. So far as the excise tax is concerned, I think that the Circuit Court of Appeals in the case of the *West India Oil Company v. Gallardo* have settled this question. In this case the court held that the 1923 law, which is of exactly the same nature as the excise part

of the law in question in this case, except as to the rates, was an excise tax and not a property tax. In the *West India Oil Company v. Gallardo* case the Circuit Court of Appeals say:

"We think it plain that this is an excise tax on sale or use, [fol. 57] and not an import tax. On analysis, the sole basis for the appellant's elaborate argument is found in the fact that most articles of personal property subjected to this tax are in Porto Rico importations; because Porto Rico is in the main an agriculture or raw material producing country with few manufactures. But this economic fact does not affect the legal nature of the tax. It could not be seriously contended that states of the United States in which motor vehicles are not manufactured cannot levy a similar tax on sale or use without coming into conflict with the prohibition of import taxes found in article I, sec. 10, of the Constitution. Compare *Woodruff v. Parham*, 8 Wall. 123; *Machine Co. v. Cage*, 100 U. S. 676; *Brown v. Houston*, 114 U. S. 500; *American Steel & Wire Co. v. Speed*, 192 U. S. 500. Porto Rico has in this regard a like power to tax.

"Equally untenable is the contention that this is a tax on property and void for lack of uniformity. The tax is upon automobiles 'manufactured, sold or used in Porto Rico'. It is not a tax upon ownership as distinguished from the production, sale or use. See the language of Chief Justice White in *Billings v. United States*, 232 U. S. 261, 280. Compare also *Brown Forman Co. v. Kentucky*, 217 U. S. 563.

"A minor contention is that the tax is void because of failure to provide for an adequate hearing as to the value or cost, to which there is or may be a 10 per cent addition. We infer that it was to meet a possible objection of this sort that section 6 was amended by Act No. 1 of the Special Session of 1923, so as to provide that *ad valorem* shall 'mean the cost plus a reasonable benefit to be estimated at 10 per cent over the amount of said cost unless (the tax payer) proves to the satisfaction of the treasurer that the profit obtained is less than said 10 per cent'."

The complainants claim irreparable damage and destruction of business. I cannot see that any such showing has been made by them. It is true that if complainants have to

pay the tax and cannot collect it all from their customers, [fol. 58] the tax would decrease their profits. However, this is no reason whatever why the law is invalid. I have found through a long experience as a consumer that the consumer is the one who finally pays the taxes and if the manufacturer, wholesaler and retailer do not charge the tax to the consumer directly, it is always done indirectly, and that the consumer ultimately pays all taxes upon the articles he buys, and so it will be under this law. This court cannot pass upon the question as to whether the taxes are so high that the dealer cannot make his usual profits. The fact remains that the expenses of Government must be paid. If the expenses are too high the tax payer should devote his efforts to having them reduced, but the expenses of Government must be paid and the tax payer is the one who eventually has to pay them.

High taxes naturally reduce profits and probably in many cases make profit impossible, yet when they are necessary to pay the expenses of government they must be paid in one form or another. A sales tax bears on all equally and each must bear his just proportion, according to the amount he buys. This court does not believe that the complainants will pay this tax and not collect it in one form or another from their customers, and it will probably be done in the same manner as they collect their freight and transportation charges. However you figure it, the consumer is the one who eventually pays all taxes upon the articles he buys. If the complainants in this case cannot obtain a fair profit upon the articles taxed under this law, it is by reason of competition or other causes over which the Government has no control and not by reason of the tax imposed by the law.

The next reason assigned by the complainants as to the validity of the law is that the exemptions contained in Section 83 are clearly arbitrary and discriminatory. Section 83 reads as follows:

"Any person comprised within the provisions of section 62 of this Act, except manufacturers whose total monthly sales do not exceed one hundred (100) dollars, shall be exempt from the payment of the tax specified in said section. Provided, That when one person alone shall have several businesses, under separate accounts, the amounts of the

monthly sales of these should together amount to less than [fol. 59] one hundred (100) dollars so as to be comprised within the exemption hereby established; Provided, further, that the tax provided by section 62 of this Act shall not attach to (1) food stuffs; (2) fluid gas; (3) electric current; (4) fertilizers, as well as all raw materials used in the manufacture of fertilizers; (5) charcoal and wood; (6) jewels and precious and semi-precious stones; (7) the sales made by agriculturists of their crops and live stock; (8) the sale of newspapers, to newspaper advertisements and literary, scientific and philosophical works and to public school text books."

A reasonable classification and exemptions has always been held to be within the powers of the legislature. Exemptions are valid as long as they are reasonable, and the amount of such exemptions is largely within the discretion of the legislature. This proposition requires no citation of authorities. Every conceivable question relating to exemptions and classification were raised in regard to the United States Income Tax Law, and it was held good. The reasoning which applies there applies here.

On the general subject of equality and uniformity in taxation and on exemption from taxation I copy part of the opinion in the case of *Bell's Gap R'd Co. v. Pennsylvania*, 134 U. S. page 237, which I think correctly states the law as applied to this case:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if chooses, exempt certain classes of property from any taxation at all such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as [fol. 60] they proceed within reasonable limits and general

usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

It is probable that the remedy of injunction has sometimes been awarded with too little regard to any other consequences than those which concern the individual applying for it. But the personal consequences are not the only ones which should be kept in view in this case. When the illegalities complained of affect only the persons complaining, an injunction which restrains proceedings as to him may cause no considerable mischief, and may very properly be awarded if a sufficient case is made out; but when they affect the whole tax levy, as in this case, a court should be extremely cautious in awarding a process which will reach the cases of others not complaining, and which would seriously embarrass all the operations of Government depending on the source of revenue which by means of it would be stopped. Courts have frequently remarked upon the [fol. 61] impossibility of the Government's calculating with any certainty upon its revenues if the collection of taxes is subject to be arrested in every instance in which a tax payer could make out a technical case for arresting the

collection of the tax, and it is justly said that it is much better to let the individual pay to the Government the demands it makes upon him, and, if he considers them wholly or in part illegal, apply for the refunding of the money with interest afterwards.

Courts do not look with favor upon suits to enjoin the collection of taxes and an injunction will only be issued in a plain case. All presumptions are in favor of the tax proceedings and the burden is on the one attacking the tax. Except under very special circumstances the power of taxation (which includes the collection as well as the assessing of taxes) ought not be interfered with by injunction, and I do not think that this is one of those cases.

Courts cannot pass upon the question of the policy of a tax law, or the expediency of the exercising of the taxing power, or the wisdom or fairness of the mode of distributing the burden of taxation, when no provisions of the Constitution are violated, and I do not believe they have been in this case.

I find that there is a lack of equity shown in this case in that the complainants have and are acting in an inequitable manner in regard to these taxes. That the complainants have an adequate remedy at law and that they have failed to show any irreparable loss or damage. That the taxes complained of are valid and legal in every respect. The petition for an injunction is therefore denied and the bill dismissed at the costs of the complainants and a decree will be entered in accordance with this opinion.

Ira K. Wells, Judge.

Dated at San Juan, Porto Rico, this eighth day of January, 1926.

#### IN UNITED STATES DISTRICT COURT

MOTION TO MODIFY DECREE—Filed January 11, 1926

Now come complainants in the above-entitled cause and respectfully show:

That on January 8, 1926, an opinion was filed by this [fol. 62] Honorable Court deciding all questions in issue

in the said cause against complainants and directing the entry of a final decree dismissing the said suit.

That prior to the return day of the order to show cause why a preliminary injunction should not issue, defendant filed an answer to the bill of complaint and on the date set for the hearing of complainants' motion for preliminary injunction counsel for defendant stated that defendant had filed an answer to the complaint denying all of the material allegations of the bill of complaint and was ready to proceed with the trial of the cause. That thereupon the undersigned counsel for complainants stated that complainants were ready to proceed to trial immediately provided that defendant would stipulate and agree to take no coercive action or proceeding against complainants to compel the payment of taxes then due or to come due, pending the trial and determination of the suit. To this counsel for defendant replied that defendant would not agree or stipulate not to proceed against complainants. Counsel for complainants then insisted that the motion for preliminary injunction should be heard and decided and asked leave to file the affidavits prepared in support of the motion. Thereupon counsel for defendant after consultation with defendant stipulated that no action pending suit would be taken by defendant against complainants provided that complainants would agree to file reports showing the amounts of their monthly sales. To this counsel for complainants agreed and the stipulation was approved by the court. Complainants understand that the above stipulation only covered the period pending final decree in this court.

That complainants propose to appeal from the final decree in this case as soon as it is entered in order that all questions involved may be reviewed by the Circuit Court of Appeals for the First Circuit. That unless the status quo is preserved pending such appeal or until such time as the Circuit Court of Appeals can hear and decide complainant's motion for an order to preserve the status quo pending appeal complainants' appeal will be entirely ineffectual inasmuch as defendant will proceed to collect the [fol. 63] taxes due by coercive means and complainants will lose all remedy to recover taxes thus coercively collected because the decision and decree of this court decides all ques-

tions against complainants including those affecting the validity of the taxes.

The complainants will thus suffer irremediable damage and will be subjected to attachments and criminal proceedings unless such action by defendant is stayed pending appeal.

That in order that the Circuit Court of Appeals for the First Circuit may have an opportunity to protect its appellate jurisdiction complainants pray that the proposed decree to be entered herein be modified to restrain all proceedings against complainants by defendant to collect the taxes involved in this suit for a reasonable time after the entry of the decree, within which time complainants shall present to the Circuit Court of Appeals for the First Circuit a petition for an order staying proceedings by defendant pending the determination of their appeal upon filing a bond in such amount and conditioned as the court may deem proper.

Henri Brown, Counsel for Complainants.

Due service with copy acknowledged this eleventh day of January, 1926, and defendant objects to the motion filed.

George C. Butte, Counsel for Defendant, by J. A. Lopez Acosta, of Counsel.

#### IN UNITED STATES DISTRICT COURT

#### ORDER ON MOTION TO MODIFY DECREE—January 16, 1926

In this case I am satisfied that the opinion rendered by this court is correct. I am satisfied that the plaintiff has no equity; that he has a plain and adequate remedy at law, and that he has not suffered any irreparable loss or injury, and that the law is constitutional, and that the plaintiff should pay the taxes. Nevertheless, I realize that the plaintiffs have a right to differ with the court, and to take an appeal, and that the Circuit Court of Appeals have a [fol. 64] right to hear this matter and decide it in accordance with justice and the facts. Although I am confident that the opinion of this court is right and supported by the

law and the evidence, yet I have no desire to place the plaintiffs or the Court of Appeals in such a position where, if they differ from this court, they could not grant such relief as the facts and the law justify. It seems to me that it is proper that the Court of Appeals should pass upon this question of supersedeas bond, and while I would not grant a supersedeas bond, and do not believe one should be granted, as these suits affect the entire tax levy and it is very important to the people of the island that the Government of Porto Rico should receive its taxes with which to operate the Government, yet as the Circuit Court of Appeals must pass upon the legality of this law and upon the correctness or incorrectness of the opinion rendered by this court, I believe that in justice and equity they should also pass upon the question of granting a supersedeas bond, and I am going to amend the decrees in the forty (40) cases decided and grant a stay of thirty (30) days. The order will be made in each of these forty (40) cases, and the time will not be extended in any case to anybody.

It is further ordered that the plaintiff, within five (5) days from this date, will pay into this court the taxes that are now due and owing the People of Porto Rico under the law in question, and the taxes in the future within five (5) days after they become due, and that such moneys abide the orders of this court. Failure to so deposit said taxes with the clerk of this court shall be a waiver to any stay granted by this order, and to all rights hereunder.

Done and ordered in open court, at San Juan, Porto Rico, this sixteenth day of January, A. D. 1926.

Ira K. Wells, Judge.

#### IN UNITED STATES DISTRICT COURT

#### FINAL DECREE—JANUARY 18, 1926

This cause came on to be heard for final hearing on the fourteenth day of October, 1925, all parties appearing by counsel and, the evidence being closed, the case was thereupon submitted to the court upon written briefs filed by the parties.

[fol. 65] And having considered the pleadings, the evidence and the briefs of counsel, the court finds that all the equities in this cause are with the defendant, Juan G. Gallardo, Treasurer of Porto Rico; that there is a lack of equity shown by complainants in this case, and that complainants have been and are lacking in an inequitable manner in regard to the taxes sought to be enjoined in their bill of complaint herein; that complainants have an adequate remedy at law as to the matters complained of and that they have failed to show any irreparable loss or damage. The court further finds that the taxes, as demanded of complainants by defendant, and which are complained of in the bill of complaint herein, are valid and legal in every respect.

It is therefore ordered, adjudged and decreed that the petition for injunction in this cause to restrain the defendant, Juan G. Gallardo, Treasurer of Porto Rico, from assessing and collecting from complainants the taxes provided under Act No. 85 of the Legislature of Porto Rico, approved August 20, 1925, be, and the same is hereby denied; and that the bill of complaint be herewith dismissed. It is further ordered, adjudged and decreed that the complainant pay all costs herein.

A stay of proceedings under this decree for 30 days from the entry hereof is granted to complainants to allow them to present a motion for supersedeas to the Circuit Court of Appeals for the First Circuit, on condition that plaintiffs shall pay into this court, within five days, all taxes now due to the Government of Porto Rico under the Act complained of, as shown by the returns filed and to be filed under the law, and shall continue to pay into the court such amounts as shall become due under said Act in the future until said application for supersedeas is decided.

Done at San Juan, P. R., this eighteenth day of January, 1926.

Ira K. Wells, Judge.

[fol. 66] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed  
January 19, 1926

To the Honorable Ira K. Wells, Judge of the said Court:

The above-named complainants, feeling themselves aggrieved by the decree made and entered in this cause on the eighteenth day of January, 1926, do hereby appeal from said decree to the Circuit Court of Appeals for the First Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the First Circuit, sitting at Boston, Massachusetts.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made.

SAN JUAN, P. R., January 19, 1926.

Henri Brown, Solicitor for Complainants.

The petition granted and appeal allowed upon giving bond conditioned as required by law in the sum of three hundred dollars.

SAN JUAN, P. R., January 19, 1926.

Ira K. Wells, Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed January 19, 1926

Now come the above-named complainants appellants and state that in the record, proceedings and in the final decree entered in this case manifest error has been committed to their prejudice, to wit:

1. The court erred in holding that the facts alleged in the bill and shown by the evidence did not entitle complainants appellants to equitable relief.

[fol. 67] 2. The court erred in holding that complainants have an adequate remedy at law.

3. The court erred in refusing to hold that complainants have no adequate remedy at law available in the United States District Court for Porto Rico.

4. The court erred in holding that complainants had failed to show irremediable damage resulting from the act sought to be restrained.

5. The court erred in holding that complainants had been guilty of inequitable practices and that they did not come into court with clean hands.

6. The court erred in holding that the excise tax in Title II of the Internal Revenue Law of Porto Rico, approved August 20, 1925, on sales of matches imported by complainants from Santo Domingo and sold by them in the original packages of importation, is valid and not repugnant to the commerce clause of the Constitution of the United States, the provisions of the Organic Law of Porto Rico and the provisions of the first Organic Law of Porto Rico continued in force.

7. The court erred in holding that the two per cent sales tax in Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, on sales of cement imported by complainants from Denmark and sold by complainants in the original packages in which imported is not void for repugnancy to the commerce clause of the Constitution and violative of the provisions of the Organic Law of Porto Rico and the provisions of the first Organic Law of Porto Rico continued in force.

8. The court erred in refusing and failing to hold that the construction of the sales tax law, Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, by defendant appellee, as imposing the tax on first sales in Porto Rico only, and the attempted collection of the said tax from complainants under such construction is erroneous and without warrant in the law.

9. The court erred in holding that the said excise tax on sales of articles imported by complainants appellants from

continental United States and foreign countries of the same [fol. 68] class as like articles manufactured or produced in Porto Rico, does not discriminate unlawfully against such imported articles and in favor of like domestic manufactures and products.

10. The court erred in holding that the said sales tax in Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, on sales of articles imported by complainants from continental United States and foreign countries, as construed and enforced by defendant, does not discriminate against the products and manufactures of the several States and foreign countries and in favor of domestic products and manufactures and constitutes an illegal burden on interstate and foreign commerce.

11. The court erred in holding that the ad valorem excise tax in Title II of the Internal Revenue Law of Porto Rico, approved August 20, 1925, does not offend against the rule of uniformity prescribed by the Organic Law of Porto Rico by reason of the inequality of burden resulting from the definition of the term "ad valorem" in the said law.

12. The court erred in holding that the ad valorem excise tax in Title II of the Internal Revenue Law of Porto Rico, approved August 20, 1925, is not repugnant to the Fourteenth Amendment to the Constitution of the United States by reason of the inequality of burden between members of the same class resulting from the method of valuation prescribed by the said excise tax law.

13. The court erred in holding that the sales tax law in Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, is not invalid for repugnancy to the provisions of the Fourteenth Amendment to the Constitution of the United States because of exemption of certain sales, articles and persons in and by Section 83 of the said law, which exempts members of the class selected and defined by the Legislature for the imposition and levy of the said tax from liability to the said tax.

14. The court erred in refusing and failing to hold that the said sales tax law, Title III of the Internal Revenue

Law of Porto Rico, approved August 20, 1925, is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States because of absence of [fol. 69] classification or of a classification based upon reasonable differences and substantial distinctions.

15. The court erred in holding that the sales tax law which is Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, is not violative of the Fourteenth Amendment to the Constitution of the United States.

16. The court erred in holding that the sales tax law, comprising Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, is not repugnant to the provisions of the Organic Law of Porto Rico prescribing that the rule of taxation in Porto Rico shall be uniform.

17. The court erred in holding that the excise taxes at specific rates ad valorem, provided in Titles I and II of the Internal Revenue Law of Porto Rico, approved August 20, 1925, do not violate the provisions of the Organic Law of Porto Rico requiring uniformity in taxation.

18. The court erred in holding that the ad valorem excise tax imposed in Titles I and II of the Internal Revenue Law of Porto Rico, approved August 20, 1925, on both domestic and foreign or non-Porto Rican products and manufactures does not violate the Fourteenth Amendment to the Constitution of the United States.

19. The court erred in holding that the sales tax law, comprising Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, as construed and enforced by defendant, does not violate the commerce clause of the Constitution of the United States.

20. The court erred in holding that the sales tax law, comprising Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, does not violate the provisions of the present and former Organic Laws of Porto Rico as to taxation of imports.

21. That the court erred in refusing to grant a permanent injunction.

22. That the decree is contrary to law.
23. For other errors appearing on the record.

Wherefore complainants pray that the said decree be reversed and the District Court of the United States for [fol. 70] Porto Rico be instructed to enter such decree as is prayed for in complainants' bill.

Henri Brown, Solicitor for Complainants.

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Bond on appeal for \$300.00, approved and filed January 25, 1926, omitted in printing.

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[fol. 71] Citation, in usual form, showing service on Juan G. Gallardo, omitted in printing.

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[fol. 72] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE AS TO DEPOSIT

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico, do hereby certify that on January 21, 1926, the complainants, J. Ochoa y Hno., deposited in the registry of this court the sum of one thousand six hundred and fifty dollars (\$1,650) as required by the order of January 16, 1926.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at San Juan, in said District, this twenty-sixth day of January, A. D. 1926, and in the 150th year of the Independence of the United States of America.

Antonio Aguayo, Clerk U. S. District Court for Porto Rico. (Seal.)

## IN UNITED STATES DISTRICT COURT

PRÆCIPUE FOR TRANSCRIPT OF RECORD—Filed January 26,  
1926

To Antonio Aguayo, Clerk of the District Court of the  
United States for the District of Porto Rico:

Please prepare a transcript of the record in this case to  
be filed in the office of the clerk of the United States Circuit  
Court of Appeals for the First Judicial Circuit, under the  
appeal taken herein, and insert in said transcript the fol-  
lowing pleadings, proceedings and papers on file, to wit:

- [fols. 73 & 74] 1. Bill of complaint.  
2. Motion for temporary injunction and restraining  
order.  
3. Order to show cause.  
4. Answer to bill of complaint.  
5. Journal entry, October 14, 1925.  
6. Journal entry, October 16, 1925.  
7. Stipulation filed October 16, 1925.  
8. Statement of evidence.  
9. Opinion.  
10. Motion to modify proposed decree.  
11. Order entered January 16, 1926.  
12. Final decree.  
13. Petition for appeal.  
14. Assignment of errors.  
15. Order allowing appeal.  
16. Bond on appeal.  
17. Citation.  
18. Certificate of clerk as to payments into court made  
under decretal stay order.  
19. This præcipe.  
20. Certificate of clerk of court certifying accuracy of  
record.

January 26, 1926.

Henri Brown, Solicitor for Complainants-Appellants.

Receipt of copy of foregoing præcipe hereby acknowl-  
edged.

January 26, 1926.

J. A. Lopez Acosta, Solicitor for Defendant.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 75] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE FIRST CIRCUIT, OCTOBER TERM, 1925

No. 1949

FINLAY, WAYMOUTH & LEE, INC., Plaintiff, Appellant,

v.

JUAN G. GALLARDO, Treasurer, Defendant, Appellee

**Transcript of Record of District Court**—Filed in Circuit  
Court of Appeals February 2, 1926

IN UNITED STATES DISTRICT COURT, DISTRICT OF PORTO RICO

In Equity. No. 1343

FINLAY, WAYMOUTH & LEE, INC., Complainant,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico, Defendant

BILL OF COMPLAINT—Filed November 9, 1925

To the Honorable Judge of the United States District Court  
for Porto Rico:

The above named complainants by its solicitor respectfully sets forth the following facts calling for equitable relief, namely:

1. That complainant is a corporation duly organized and existing under and by virtue of the laws of Porto Rico and domiciled in Porto Rico.
2. The defendant, Juan G. Gallardo, is the duly appointed, qualified and acting Treasurer of the Island of [fol. 76] Porto Rico, and is a citizen and resident of said Island.
3. That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of \$3,000.

4. That complainant is now, and for many years last past has been engaged in the business of selling in Porto Rico, both at wholesale and retail, lumber, cement, building materials, hardware, paints, galvanized and cast iron pipes, linoleum, typewriters and other articles. Complainant purchases and imports from Denmark and average of 4,000 barrels of cement that it sells in the original packages in which the same is imported. All other articles sold by complainant are purchased in and imported from continental United States with the exception of occasional importations of paint from foreign countries.

That complainant has a paid up capital of one hundred thousand dollars (\$100,000) which is invested in its said business and has built up a large and valuable trade and good will.

5. At the last ordinary session of the Legislature of Porto Rico Act No. 85 was passed and was approved by the Governor of Porto Rico on August 20, 1925. The said Act is entitled "An Act to Provide Revenues for The People of Porto Rico by Levying Certain Sales Taxes and Taxes for the Manufacture, Use, Sale and Consumption of Certain Products, and by the levying of Certain Excise and License Taxes on Certain Occupations, Industries and Businesses; To Impose Certain Penalties; To Repeal the Laws in Force Providing for Excise and License Taxes and for Other Purposes."

Title I of the said Act is comprised of definitions of terms employed in the Act; Title II (Section 16) of the Act entitled "Excise Taxes" provides for the levy and collection of a tax to be collected and paid "once only" on the sale, transfer, use or consumption of enumerated articles; Title III of the said Act entitled "Sales Taxes" provides for the levy and collection of a tax of two per cent on the sale of "any articles the object of commerce" not subject to the [fol. 77] excise tax levied in Title II or specifically exempted in Section 83 of the Act, and Title IV deals with "License Taxes" on the businesses and occupations specified therein.

6. That the only articles sold by complainant subject to the excise tax provided by Title II of the said Act are typewriters and linoleum upon which a tax of seven (7) per cent ad valorem is imposed.

The phrase *ad valorem* is defined in Section 4 of the said Act as follows:

"For the purposes of this Act, the phrase '*ad valorem*' shall be construed to mean the cost of the article when in the possession of the person, plus a reasonable profit to be estimated at ten (10) per cent of said cost, if such person fails to prove, to the satisfaction of the Treasurer of Porto Rico, that the profit obtained on such article is less than the aforesaid percentage: Provided that the word '*person*' as used in this section shall have the meaning given thereto in Section 5 of this Act."

Section 5 of the said Act provides that the word "*person*" shall include not only all natural persons and all manufacturers or dealers, but also all partnerships, associations of all classes, limited liability joint stock companies, companies, corporations or any other artificial person.

Sections 37, 39 and 42 of the said Act provide that the tax shall be paid upon the first sale in Porto Rico of the article taxed whether such first sale be made by a manufacturer, wholesaler, retailer or other person.

7. The so called excise tax imposed upon the sale of the articles mentioned in the preceding paragraph is a discriminating tax that operates unequally upon members of the same class in which complainant is included, namely wholesale and retail dealers. While the tax is on sales the value of the article upon which the different percentages are assessed is an entirely arbitrary value or amount that bears no relation to the actual sale price or amount. Thus a dealer whose gross profit upon the article sold is fifty per cent [fol. 78] pays a tax of approximately five (5) per cent upon the actual sales price as against a tax of seven (7) per cent upon the sale of the same article by a dealer whose actual gross profit is ten (10) per cent or less. Again, where a dealer is compelled to sell an article at less than actual cost, the tax is none the less based upon actual cost and the rate of tax is in excess of that imposed on other dealers who sell at cost or at some profit.

In this connection complainant alleges and shows that other wholesale and retail dealers in competition with com-

plainant sell some of the same taxable articles at a greater profit than does complainant by reason of a greater discount or lower purchase price and that by reason of such larger profits pay a lower rate of tax upon the actual sale price of such articles.

8. Furthermore the said excise tax law discriminates against articles manufactured or produced in continental United States and in favor of articles produced or manufactured in Porto Rico in that the tax imposed upon the article the product or manufacture of Porto Rico, is upon the cost of the manufacturer or producer of the domestic article plus ten per cent, while the tax on the article imported from continental United States is upon a value or amount that includes not only the manufacturer's but also the wholesaler's or retailer's assumed profit of ten per cent upon a cost in excess of the manufacturer's cost plus ten per cent. That this inequality and discrimination is the consequence and result of imposing the tax upon the first sale in Porto Rico instead of imposing the same on the ultimate sale to the consumer. As a consequence complainant is compelled to pay a tax on its wholesale and retail sales where other wholesalers and retailers purchasing their goods in Porto Rico pay no tax whatever and complainant is compelled to pay a higher tax on the imported articles than is levied on the same domestic articles.

For the reasons stated in this and the next preceding paragraph the said excise tax on complainant's sales of the articles subject to the said excise tax is violative of the provisions of the Fourteenth Amendment to the Constitution of the United States and of the commerce clause of the same. [fol. 79] It is furthermore repugnant to the provisions of the Organic Law of Porto Rico, in which the equal protection of the laws is guaranteed.

9. That all articles sold by complainant other than those subject to the excise taxes under Title II of the said Act are subject to the "sales tax" of two per cent on the price or value of the articles sold imposed by Title III of the said Act. Section 62 of the said Act, which is the first section of Title III, fixes and defines this tax as follows:

"There shall be levied and collected on the sale of any articles the object of commerce not specified in Section 16

of this Act or exempted from taxation as provided in said section, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which shall be paid at the end of each month by the person making such sales."

Section 83 exempts certain persons and articles from the payment of such tax as follows:

"Any person comprised within the provisions of Section 62 of this Act, except manufacturers whose total monthly sales do not exceed one hundred (100) dollars, shall be exempt from the payment of the tax specified in said section; Provided, that when one person alone shall have several businesses, under separate accounts, the amounts of the monthly sales of these should together amount to less than one hundred (100) dollars so as to be comprised within the exemption hereby established; Provided, further, that the tax provided by Section 62 of this Act shall not attach to (1) food stuffs, (2) fluid gas; (3) electric current, (4) fertilizers as well as all raw material used in the manufacture of fertilizers; (5) charcoal and wood; (6) jewels and precious and semi-precious stones; (7) the sales made by agriculturists of their crops and live stock; (8) the sale of newspaper, to newspaper advertisements and literary, scientific and philosophical works and to public school text books."

[fol. 80] Section 65 of the Act requires all persons obligated to pay the sales tax to keep books of account under such requirements as the Treasurer of Porto Rico shall by regulation prescribe and Section 69 obliges "every manufacturer, wholesale dealer, retail dealer, representative, commission merchant or any other person making sales" to produce and exhibit his books to authorized officers of the Department of Finance. Affidavits showing the gross proceeds of monthly sales are to be filed on the last day of the month and not later than the ten days following. The tax is to be paid by affixing internal revenue stamps to documents prepared by the Treasurer for that purpose and cancelling such stamps, but no such payment is final until approved by the Treasurer or his duly authorized internal revenue agents.

10. The sales tax as provided in and by Title III of the said Act is a tax on property. All sales of articles the object of commerce, except those expressly excluded, at any time and place are subject to the tax. Liability to payment is in no way conditioned upon or incidental to the exercise of any privilege, the employment of any facility or engaging in any occupation not common to all citizens. There is no classification (for exemption is not classification).

For these reasons complainant alleges that the law imposing the sales tax is invalid for repugnancy to the rule of uniformity prescribed by the Organic Act in that property exempted from the operation of this tax is subject to property taxes under the provisions of the Political Code of Porto Rico.

11. If the said sales tax law be held to be an excise tax it is likewise invalid for repugnancy to the provisions of the Fourteenth Amendment to the Constitution of the United States and the similar provisions of the Organic Act in that the classification, if indeed it be classification, is arbitrary and based on no proper or justifiable distinctions. Thus out of the mass of citizens who sell articles the object of commerce are segregated from the operation of the law those whose monthly sales of articles the object of commerce do not exceed one hundred dollars and agriculturists with respect to their crops and livestock and vendors of [fol. 81] fertilizers and materials for the manufacture of fertilizers all of whom are members of the same class.

In this connection complainant alleges that there are a very large number of retail dealers in Porto Rico who sell principally foodstuffs but who also carry in stock and sell in competition with complainant and other dealers, hardware, implements and other taxable articles, whose individual monthly sales of such taxable articles do not exceed one hundred dollars but whose aggregate sales of such articles amount to several thousand dollars monthly; that the principal business in Porto Rico is agriculture and that sales of agricultural products comprise more than one-half of all sales of articles the object of commerce.

12. Notwithstanding the fact that the said sales tax law imposes a tax on all successive sales of a taxable article the defendant has construed it to provide for the collection

of the tax upon only one sale of the same article and is collecting and requiring the payment of such tax only upon the first sale of the taxable article in Porto Rico whether such first sale be made by the manufacturer, wholesaler, retail dealer or other person.

According to defendant's construction of the law, retailers and other persons are only required to pay the tax where they purchase the taxable articles from manufacturers or dealers in continental United States or foreign countries. Defendant is administering the law, as complainant is informed and believes, in accordance with the theory and construction above set out and in so singling out sales by manufacturers and producers for the collection of the tax and exempting wholesale and retail dealers and other persons who purchase the articles they sell from such domestic manufacturers and producers is acting without legal warrant and without authorization of the Act in suit. The defendant is equally unauthorized by the law in requiring payment of the tax from wholesale and retail dealers who purchase in and import the taxable articles so purchased from continental United States or foreign countries while he exacts no tax from wholesale and retail dealers who purchase from domestic or Porto Rican manufacturers and wholesale producers.

[fol. 82] The said tax law as thus construed and administered by defendant discriminates unlawfully against manufactures and products of continental United States and in favor of domestic or Porto Rican manufactures and products and imposes an unequal burden on the former.

And complainant charges that the sale tax law construed and administered as above set out deprives complainant of the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States and the Organic Law of Porto Rico. And is also violative of the commerce clause of the Constitution of the United States and of the Organic Law of Porto Rico.

13. Complainant further alleges that the defendant requires of complainant the payment of the sales tax on articles imported by complainant from foreign countries and sold by complainant in the original packages or containers in which such articles are imported, and that the law as thus construed and enforced violates the commerce

clause of the Constitution of the United States and the prohibition of a tax on imports of the Organic Law.

14. Complainant's annual sales of articles subject to the excise tax imposed under the provisions of Title II of the said Act amount to \$15,000 and its annual sales of articles subject to the sales tax imposed by Title III of the said Act amount to \$524,000 and that its sales of said articles for the next twelve months will not be less than said amounts and that its importations of cement from Denmark for resale in the original packages will average at least four thousand barrels monthly for the next twelve months, of which considerable amounts will shortly arrive in Porto Rico.

15. That the defendant demands that complainant furnish the monthly statements and affidavits of gross sales required by the said law and the monthly payment of said taxes, the next payment of which is due on November 10, 1925, and that defendant threatens that if complainant refuses or fails to make such declarations and statements or to pay the said taxes that he will seize and sell complainant's property to satisfy the tax and penalty provided by the said law and will institute criminal proceedings against [fol. 83] complainant to subject complainant to severe fines and imprisonment.

16. That the requirements of the said law as to keeping separate accounts of sales of articles taxed at different rates, the making of statements and declarations, the subsection of complainant's books, papers and accounts to repeated investigations, the visitations authorized by the law, taken together with the similar requirements of existing tax laws and the burden of taxation resulting from property tax, income tax (of which the sales tax is in substance and effect a duplicate) and license taxes so substantially harrass complainant; embarrass and obstruct the conduct of its lawful business and reduce and destroy returns from the investment of capital of complainant as to deprive complainant of its constitutional right to pursue of a legitimate and useful occupation.

17. That the said taxes (excise and sales) are imposed directly upon the vendors and as to the sales taxes complainant will not be able to collect the same from purchasers;

that an increase in prices to include such tax or the attempt to pass the same on to the purchasers will result in the destruction of complainant's wholesale and retail business in that dealers heretofore purchasing from complainant will purchase direct from dealers in continental United States and complainant's retail business will for the same reason be seriously impaired.

That by reason of the constantly changing views of defendant and his interpretation of the law as evidenced by the regulations thus far promulgated complainant's business is partially disorganized.

18. That defendant is not financially able to respond in damages for the loss sustained and to be sustained by complainant through the aforesaid unlawful acts of defendant; that if the threatened acts of defendant are not restrained by this Honorable Court, complainant will suffer irreparable loss and injury, as to which complainant has no adequate remedy at law nor would remedy at law be adequate even if available in this court and even if it were possible under the laws of Porto Rico to recover from the Treasurer [fol. 84] the aforesaid taxes unlawfully collected, since such remedy would involve a multiplicity of suits and since the said taxes in addition to existing lawful taxes are so burdensome, the acts and duties prescribed by the said law so onerous and the resulting disorganization and loss and damage to complainant's business and good will will be so great pending the final decision of such suits, that complainant would suffer irreparable loss.

19. Complainant accordingly states that the said defendant is acting without any lawful authority or warrant in requiring complainant to furnish statements and affidavits of its sales and to pay the so-called "excise" and "sales" taxes upon the sale of the articles above mentioned and in threatening to seize and sell complainant's property and to bring criminal proceedings to compel the collection of the said taxes, and that defendant being without such authority and warrant his acts and threatened acts will constitute trespass upon and unwarranted interference with complainant's said business and that unless the said defendant and those acting under or through him be enjoined from the said

unlawful acts complainant will suffer irreparable loss and damage in at least the sum of \$100,000, as against which complainant is without adequate remedy at law.

Forasmuch as complainants are without adequate remedy for the wrongs aforesaid except in a Court of Equity, complainant prays that defendant be required to make full, true, direct and perfect answer, according to the utmost of his knowledge, information and belief, unto the allegations of this bill of complaint (but not under oath, an answer under oath being hereby expressly waived) and complainant prays that defendant and all persons acting by, under or through his authority be, pending this suit and perpetually, enjoined and restrained from seizing complainant's property and from prosecuting or threatening to prosecute complainant by reason of complainant's failure or refusal to make and furnish the statements and affidavits required by Titles II and III of Act No. 85 of the Legislature of Porto Rico, approved August 20, 1925, or from collecting or attempting to collect the excise tax or sales tax provided in [fol. 85] the said titles and Act upon sales of the articles subjected to the said taxes by the said Act. And that complainant be granted general relief in the premises.

J. H. Brown, by Clemente Ruiz Nazario, Counsel for Complainants.

*Duly sworn to by Waldemar E. Lee. Jurat omitted in printing.*

#### IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed January 19, 1926

To the Honorable Ira K. Wells, Judge District Court of the United States for Porto Rico:

Now comes the defendant represented by the Attorney General of Porto Rico and undersigned counsel, and, by special permission of the court, files its motion to dismiss in the above entitled case on the following grounds:

1. Because the facts as stated in the complaint are insufficient to constitute a good cause of action in equity on behalf of the plaintiff:

[fol. 86] (a) Because Act No. 85, of August 20, 1925, approved by the Legislature of Porto Rico, is valid, legal and enforceable.

(b) Because said law imposes an excise tax on the sale of the article, and not a property tax.

(c) Because Sections 62 and 83 of said Act impose an excise tax on the sale, and not a tax on property.

(d) Because neither the excise tax nor the sales tax provided for in the said law are unconstitutional; or in any way contrary to the Organic Act of Porto Rico.

2. Because complainant has an adequate, speedy and sufficient remedy at law by payment under protest, under Act No. 9, of June 23, 1924, as amended by Act No. 84, of 1925.

Wherefore, defendant prays the court to dismiss the bill of complaint herein filed, with costs, granting any other remedy that it may deem meet and proper.

San Juan, Porto Rico, January 18, 1926.

George C. Butte, Attorney General of Porto Rico,  
J. A. Lopez Acosta, of Counsel.

Copy received this eighteenth day of January, 1926.

Henri Brown, Attorney for Complainant.

#### IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed January 19, 1926

On this nineteenth day of January, A. D. 1926, at this term, came on to be heard the above style and number cause. By permission of the court and by agreement of counsel for the parties, defendant withdrew his answer heretofore filed, and thereupon filed a motion to dismiss this cause.

And having heard and considered the motion and the argument of counsel thereon, the court finds that there is

no merit in the bill of complaint in this cause; that complainant has an adequate remedy at law; that Act No. 85 of the Legislature of Porto Rico, approved August 20, 1925, [fol 87] is valid, legal and enforceable; and that the taxes imposed on complainant under said law are excise taxes and not a tax on property, nor a tax on imports.

It is therefore ordered, adjudged and decreed by this court that the bill of complaint filed herein asking for an injunction to restrain the defendant, Juan G. Gallardo, Treasurer of Porto Rico, from assessing and collecting against the complainant the taxes complained of, be and the same is hereby dismissed, with all costs, against the complainant.

A stay of proceedings under this decree for thirty days from the entry hereof is granted to complainants to allow them to present a motion for supersedeas to the Circuit Court of Appeals for the First Circuit; on condition that plaintiffs shall pay into this court, within five days, all taxes now due to the Government of Porto Rico under the act complained of, as shown by the returns filed and to be filed under the law, and shall continue to pay into the court such amounts as shall become due under said Act in the future until said application for supersedeas is decided.

Done at San Juan, Porto Rico, this nineteenth day of January, 1926.

Ira K. Wells, Judge.

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IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed  
January 22, 1926

To the Honorable Ira K. Wells, Judge of the said Court:

The above named complainant, feeling itself aggrieved by the decree made and entered in this cause on the nineteenth day of January, 1926, does hereby appeal from said decree to the Circuit Court of Appeals for the First Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that its appeal be allowed and that citation issue as provided by laws and that a transcript of

the record, proceedings and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the First Circuit, sitting at Boston, Massachusetts.

[fol. 88] And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

Henri Brown, Solicitor for Complainant.

The petition granted and appeal allowed upon giving bond conditioned as required by law, in the sum of three hundred dollars.

Ira K. Wells, Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERROR—Filed January 22, 1926

Now comes Finlay, Waymouth & Lee, Inc., complainant-appellant, and states that in the record, proceedings and in the final decree entered in this case, manifest error has been committed to its prejudice, to wit:

1. The court erred in holding that the facts alleged in the bill of complaint are insufficient to entitle complainant to equitable relief.

2. The court erred in holding that complainant has an adequate remedy at law.

3. The court erred in failing to hold that complainant has no adequate remedy at law available in the United States District Court for Porto Rico.

4. The court erred in failing to hold that the facts alleged in the bill of complaint entitle complainant to relief in equity upon the ground of irremediable damage and to avoid a multiplicity of suits.

5. The court erred in failing to hold that the excise tax levied under the provisions of Title II of the Internal Revenue Law of Porto Rico, approved August 29, 1925, on sales of articles imported by complainant from foreign countries for resale and sold in the original packages of importation is invalid because it imposes an illegal burden on foreign

commerce in violation of the commerce clause of the Constitution of the United States and the provisions of the Organic Law of Porto Rico.

[fol. 89] 6. That the court erred in failing to hold that the sales tax levied under Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, on sales of articles imported by complainant from foreign countries for resale and sold by complainant in the original packages of importation is invalid because it imposes an illegal burden on foreign commerce in violation of the commerce clause of the Constitution of the United States.

7. That the court erred in failing to hold that the sales tax levied under Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, on sales of articles imported by complainant from foreign countries for resale and sold by complainant in the original packages of importation is violative of the provisions of the Organic Law of Porto Rico and of the provisions of the first Organic Law of Porto Rico continued in force prohibiting the taxation of imports.

8. That the court erred in failing to hold that the ad valorem excise tax provided in and by Title II of the Internal Revenue Law of Porto Rico, approved August 20, 1925, upon the basis of valuation prescribed in Section 4 of Title I of the said law, upon articles sold by complainant subject to such tax is invalid because it violates the rule of uniformity prescribed by the Organic Law of Porto Rico and the provisions of the Fourteenth Amendment to the Constitution of the United States.

9. The court erred in failing to hold that the excise tax levied under the provisions of Title II of the Internal Revenue Law of Porto Rico, approved August 20, 1925, on sales of articles imported by complainant from continental United States discriminates against the manufactures of the several States and in favor of Porto Rican manufactures and is violative of the commerce clause of the Constitution of the United States.

10. The court erred in refusing and failing to hold that the construction of the sales tax law, Title III of the Internal Revenue Law of Porto Rico, approved August 20,

1925, by defendant appellee, as imposing the tax on first sales in Porto Rico only and the attempted collection of the said tax from complainant under such construction is erroneous and without warrant in the law.

[fol. 90] 11. The court erred in holding that the said sales tax in Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, on sales of articles imported by complainant from continental United States and foreign countries, as construed and enforced by defendant, does not discriminate against the products and manufactures of the several States and foreign countries and in favor of domestic products and manufactures and constitute an illegal burden on interstate and foreign commerce.

12. The court erred in holding that the sales tax law in Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, is not invalid for repugnancy to the provisions of the Fourteenth Amendment to the Constitution of United States because of exemption of certain sales, articles and persons in and by Section 83 of the said law, which exempts members of the class selected and defined by the Legislature for the imposition and levy of the said tax from liability from the said tax.

13. The court erred in refusing and failing to hold that the said sales tax law, Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States because of absence of classification or of a classification based upon reasonable differences and substantial distinctions.

14. The court erred in holding that the sales tax law which is Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, is not violative of the Fourteenth Amendment to the Constitution of the United States.

15. The court erred in holding that the sales tax law comprising Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, is not repugnant to the provisions of the Organic Law of Porto Rico, prescribing that the rule of taxation in Porto Rico shall be uniform.

16. The court erred in holding that the sales tax law, Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, properly construed imposes an excise and not a property tax.

17. The court erred in dismissing the bill of complaint. [fol. 91] 18. The court erred in refusing to grant an injunction upon the facts alleged in the bill.

19. That the decree is contrary to law.

Wherefore, complainant prays that the said decree be reversed and the District Court of the United States for Porto Rico be instructed to enter such decree as is prayed for in complainant's bill.

Henri Brown, Solicitor for Complainants.

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Bond on appeal for \$300.00, approved and filed January 22, 1926, omitted in printing.

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[fol. 92]      IN UNITED STATES DISTRICT COURT

PRECIPUE FOR TRANSCRIPT OF RECORD—Filed January 22, 1926

To Antonio Aguayo, Clerk of the District Court of the United States for the District of Porto Rico:

Please prepare a transcript of the record in this case to be filed in the office of the clerk of the United States Circuit Court of Appeals for the First Judicial Circuit, under the appeal taken herein, and insert in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Bill of complaint.
2. Motion to dismiss.
3. Final decree.
4. Petition for appeal.
5. Assignment of errors.
6. Order allowing appeal.
7. Bond on appeal.
8. This precipe.

[fol. 93] 9. Certificate of clerk of court certifying accuracy of record.

San Juan, Porto Rico, January 22, 1926.

Henri Brown, Solicitor for Complainant.

Service with copy of above *præcipe* is hereby admitted. Appellee finds the same to be complete, will request no additions thereto.

San Juan, P. R., January 22, 1926.

George C. Butte, Solicitor for Defendant.

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IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL PRÆCIPLE FOR TRANSCRIPT OF RECORD—Filed  
January 25, 1926

To Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico:

Please include in the transcript of the record in this case, in addition to the papers, pleadings and proceedings mentioned in the *præcipe* filed herein, the following:

Certificate of clerk of court as to the sum paid into court by complainant in conformity with decretal stay order.


This supplemental *præcipe*.

January 26, 1926.

Henri Brown, Solicitor for Appellant.

Receipt of copy of above supplemental *præcipe* is hereby acknowledged.

George C. Butte, Solicitor for Defendant, by J. A. Lopez Acosta.



## IN UNITED STATES DISTRICT COURT

## CLERK'S CERTIFICATE AS TO DEPOSIT

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico, do hereby certify that on January 23d, 1926, the complainant, Finlay, Waymouth & [fol. 94] Lee, Inc., deposited in the registry of this court the sum of two thousand nine hundred twelve and 94/100 dollars, as required by the order of this court of January 16, 1926.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at San Juan, in said District, this twenty-fifth day of January, A. D. 1926, and in the 150th year of the Independence of the United States of America.

Antonio Aguayo, Clerk U. S. District Court for Porto Rico. (Seal.)

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Clerk's certificate to foregoing transcript omitted in printing.

[fol. 95] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE FIRST CIRCUIT, OCTOBER TERM, 1925

No. 1955

ANGEL ABARCA PORTILLA et al. (Sucesores de Abarca),  
Plaintiffs, Appellants,

v.

JUAN G. GALLARDO, Treasurer, Defendant, Appellee

**Transcript of Record of District Court**—Filed in Circuit  
Court of Appeals, February 9, 1926

IN UNITED STATES DISTRICT COURT, DISTRICT OF PORTO RICO

Equity. No. 1322

ANGEL and RAFAEL ABARCA PORTILLA, ENRIQUE, RAMON,  
JOSE, CELESTINA, and EMILIA ABARCA SANFELIZ, and ANGEL  
ABARCA CORTINA, Copartners, Doing Business under the  
Firm Name and Style of Sucesores De Abarca, Com-  
plainants,

v.

JUAN G. GALLARDO, Treasurer of Porto Rico, Defendant

**BILL OF COMPLAINT**—Filed October 9, 1925

To the Honorable Judge of the District Court of the United  
States for Porto Rico:

The above named complainants, by their solicitor, re-  
spectfully set forth the following facts calling for equitable  
relief, namely:

[fol. 96] 1. Your complainants, Angel and Rafael Abarca  
Portilla, Enrique, Ramon, Jose, Celestina and Emilia  
Abarca Sanfeliz and Angel Abarca Cortina are co-part-  
ners, doing business under the firm name and style of  
Sucesores de Abarca. Complainants Angel and Rafael  
Abarca Portilla are managing partners and the remaining  
complainants are silent partners or "comanditarios."

All of complainants, with the exception of Enrique and Ramon Abarca Sanfeliz, who are citizens of the United States, are subjects of the King of Spain and all complainants are domiciled in Porto Rico.

2. The defendant, Juan G. Gallardo, is the duly appointed and qualified Treasurer of Porto Rico and is a resident and citizen of said island.

3. That the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.

4. Complainants own and operate machine shops and foundries in the City of San Juan and are also engaged in the said City of San Juan in the business of selling machinery and supplies including screws, packings, motors, asbestos, ammonia, oxygen, steel bars and plates, pumps, belting for machinery, files, hose, tubes, valves, forges and numerous other manufactures of iron and steel. All of the above articles sold by complainants are purchased in and imported from continental United States by complainants. Some of the said articles manufactured in continental United States and so imported and sold by complainants are also manufactured in Porto Rico. Complainants' said business has been long established and in it they have invested large sums of money and built up a large and profitable trade.

5. That at the last ordinary session of the Legislature of Porto Rico Act No. 85 was passed and was approved by the Governor of Porto Rico on August 20, 1925. The said Act is entitled "An Act to Provide Revenue for The People of Porto Rico by Levying Certain Sale Taxes and Taxes for the Manufacture, Use, Sale and Consumption of Certain Products and by the Levying of Certain Excise and [fol. 97] License Taxes on Certain Occupations, Industries and Businesses; to Impose Certain Penalties; to Repeal the Laws in Force Providing for Excise and License Taxes, and for Other Purposes." Title I of said Act is comprised of definitions of the terms employed therein; Title II of the Act is entitled "Excise Taxes" and imposes certain taxes upon the manufacture of specified articles and upon the sale, transfer, use or consumption of enumerated articles

and Title III of the said Act entitled "Sales Taxes" provides for the levy and collection of a tax of two (2) per cent on the sales price or value of all articles the object of commerce, except as to persons or sales expressly exempted. The said sales tax is defined and provided in the first section of Title III, Section 62 of the Act, as follows:

"There shall be levied and collected on the sale of any articles the object of commerce, not specified in section 16 of this Act or exempted from taxation as provided in said section, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sales."

Section 83, the final section of said title, exempts certain persons and articles from the tax as follows:

"Any person comprised within the provisions of section 62 of this Act, except manufacturers whose total monthly sales do not exceed one hundred (100) dollars, shall be exempt from the payment of the tax specified in said section; Provided, That when one person alone shall have several businesses, under separate accounts, the amounts of the monthly sales of these should together amount to less than one hundred (100) dollars so as to be comprised within the exemption hereby established; Provided, further, That the tax provided by section 62 of this Act shall not attach to (1) food stuffs; (2) fluid gas; (3) electric current; (4) [fol. 98] fertilizers, as well as all raw material used in the manufacture of fertilizers; (5) charcoal and wood; (6) jewels and precious and semi precious stones; (7) the sales made by agriculturists of their crops and live stock; (8) the sale of newspapers, to newspaper advertisements and literary, scientific and philosophical works and to public school text books."

Section 63 of the said Act and title provides that all persons comprised in Section 62, whatever the nature of their business may be, shall file on the last day of each month, and not later than within the ten days following, an affidavit showing the gross proceeds of the monthly sales made, whether for cash or on credit, of all articles covered

and defined by Section 62 of the Act. Section 65 requires all such persons to keep books of account as prescribed by regulations of the Treasurer of Porto Rico and Section 69 requires "every manufacturer wholesale dealer retail dealer, representative, commission merchant or any other person making sales" to produce his account books and other evidence relative to purchases and sales made by him whenever required by the duly authorized officer of the Department of Finance.

Section 71 of the said Act and title provides that "The sales tax specified in this Act shall be paid by affixing internal revenue stamps to the documents prepared for the purpose by the Treasurer of Porto Rico and cancelling said stamps on the document," and Section 72 of the said Act provides that "Payment of the taxes specified in the preceding section shall not be considered as finally and definitely made until approved by the Treasurer of Porto Rico or by his duly authorized internal revenue agents."

The said sales tax defined and provided by Title III of the said Act imposes a tax upon every sale of the articles subject thereto at any time and at any place and by any person not expressly excluded or exempted from its operation. Liability to payment is in no way conditioned upon or incidental to the exercise of any privilege, the employment of any facilities, or the engaging in any occupation not common to all citizens. There is no true classification (for exemption is not classification). One of the two great [fol. 99] divisions of all property, namely, personal property, is selected, and all persons selling the same are subjected to the tax, except certain persons and articles of the same class, that are arbitrarily exempted. For these reasons complainants allege that the said Sales Tax Law imposes a tax upon property and is invalid for repugnancy to the rules of uniformity prescribed by the Organic Act of Porto Rico in that property and persons exempted from the operation of this tax are subject to property taxes under the provisions of the Political Code of Porto Rico.

6. Considered as an excise tax the said sales tax is likewise invalid for repugnancy to the provisions of the Fourteenth Amendment to the Constitution of the United States and similar provisions of the Organic Act, in that

the classification, if indeed it be classification, is arbitrary and based on no proper or justifiable distinctions. Thus, out of the mass of citizens who sell articles the object of commerce, are segregated and excluded from the operation of the law those whose monthly sales of articles, object of commerce, do not exceed one hundred (100) dollars, and agriculturists with respect to their crops and live stock, all members of the same class. In this connection complainants allege that there are a very large number of retail dealers in Porto Rico who sell principally food stuffs, but who also carry in stock and sell in competition with complainants and other dealers the same articles sold by complainants, whose individual monthly sales of such taxable articles do not exceed one hundred (100) dollars, but whose aggregate sales of such articles amount to several thousand dollars monthly.

7. Notwithstanding that the said sale tax law imposes a tax on all successive sales of the same taxable article, the defendant has construed it to provide for the collection of the tax upon only one sale of such article and is collecting and requiring the payment of such tax only upon the first sale of the taxable article in Porto Rico, whether such first sale be made by the manufacturer, wholesaler, retail dealer or other person. According to defendant's construction of the law, retailers and other persons are only required to pay the tax where they purchase taxable articles from [fol. 100] manufacturers or dealers in the continental United States or foreign countries, while the sales of dealers or wholesalers who purchase from manufacturers or dealers in Porto Rico are not subjected to the tax. Defendant is administering the law, as complainants are informed and believe, in accordance with the theory and construction above set out and in so singling out sales by manufacturers and wholesalers for the collection of the tax and exempting retail dealers and other persons who purchase the articles they sell from domestic manufacturers and retailers, is acting without legal warrant and without authorization of the Act in suit. The defendant is equally unauthorized by the law in requiring payment of tax from retail dealers and wholesalers who purchase the taxable articles in the continental United States and import the

same into Porto Rico, while he exacts no tax from wholesale or retail dealers who purchase from domestic or Porto Rican manufacturers and wholesalers dealers. Complainants allege that some of the articles sold by complainants are manufactured in Porto Rico and that the sales tax as to such articles manufactured in Porto Rico under defendant's construction of the law, and as he enforces it, is imposed only upon the sales of manufacturers and not upon the sales of wholesalers and retailers who purchase from such manufacturers, while complainants, purchasing all of said articles in continental United States, are required to pay the tax upon all wholesale and retail sales of the same. The said tax law as thus construed and enforced by defendant discriminates unlawfully against manufactures and products of the continental United States and in favor of domestic or Porto Rican manufactures and products and imposes a greater burden upon the former, and complainants charge that the Sales Tax Law, construed and enforced as above set out, deprives complainants of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and the Organic Law of Porto Rico, and is also violative of the commerce clause of the Constitution of the United States.

8. That complainants' annual sales of articles subject to the sales tax provided in and by said Act exceeds \$325,000 [fol. 101] and their sales of such articles during the next twelve months will amount to at least \$325,000 and that the tax thereon to at least \$6,500. That defendant demands that complainants furnish the monthly statements and affidavits of the gross sales required by the said law and the monthly payment of the said taxes, the next payment of which is due on October 10, 1925, and that defendant threatens that if complainants refuse or fail to make such declarations or statements or to pay the said taxes, that he will seize and sell complainants' property to satisfy the tax and double penalty provided by the said law, and will institute criminal proceedings against complainants to subject them to severe fines and imprisonment. That the said Sales Tax Law as construed and enforced by defendant deprives complainants of their right under the

Constitution of the United States and the Organic Act of Porto Rico to free and equal competition in the market of Porto Rico, and will, if defendant be not restrained from the collection of the said tax, destroy complainants' said business. In this connection complainants show that the said sales taxes are imposed directly upon vendors and that, unlike the excise tax, no charge is laid upon use or consumption. That complainants' customers have refused and are refusing to pay the tax or to allow complainants to include the same in the price of the sale and threaten that if complainants insist upon directly or indirectly collecting such sales tax upon the sales made by complainants to such purchasers that the latter will purchase directly from manufacturers and dealers in the continental United States.

9. Upon information and belief that defendant is not financially able to respond in damages for the loss sustained and to be sustained by complainants throughout the aforesaid unlawful acts of defendant; that if the threatened acts of the defendant are not restrained by this Honorable Court complainants will suffer irreparable loss and injury, as to which complainants have no adequate remedy at law, nor would remedy at law be adequate even if available in this court and even if it were possible under the laws of Porto Rico to recover from the Treasurer of Porto Rico the aforesaid taxes unlawfully collected, since such remedy [fol. 102] would involve a multiplicity of suits and that pending the final decision of such suits complainants' business would be substantially destroyed and complainants would suffer irreparable loss.

10. Complainants accordingly state that the said defendant is acting without any lawful authority or warrant in requiring complainants to furnish statements and affidavits of their sales and to pay the so called sales tax upon the sale of the articles above mentioned and in threatening to seize and sell complainants' property and to bring criminal proceedings to compel the payment of the said taxes, and that defendant being without such authority and warrant his acts and threatened acts will constitute trespasses and unwarranted interference with complainants' said business and that unless said defendant and those acting by, under or through him be enjoined from said unlawful acts,

complainants will suffer irreparable loss and damage in at least the sum of \$100,000 as against which complainants are without adequate remedy at law.

Forasmuch as complainants are without adequate remedy for the wrongs aforesaid, except in a court of equity, complainants pray that defendant be required to make full, true, direct and perfect answer according to the unmost of his knowledge, information and belief unto the allegations of this bill of complaint (but not under oath, and oath being hereby expressly waived) and complainants pray that the defendant and all persons acting by, under or through his authority be, pending this suit and perpetually, enjoined and restrained from seizing complainants' property and from prosecuting or threatening to prosecute complainants be reason of complainants' failure or refusal to make and furnish the statements and affidavits required by Title III of Act No. 85 of the Legislature of Porto Rico approved August 20, 1925, or from collecting or attempting to collect the sales tax provided in the said title and Act upon complainants' sales of articles subject to the said tax by the said Act. And that complainants be granted general relief in the premises.

Henri Brown, Solicitor for Complainants.

[fol. 103] *Duly sworn to by Rafael Abarca. Jurat omitted in printing.*

#### IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 13, 1925

To the Honorable Ira K. Wells, Judge of the District Court of the United States for Porto Rico:

Now come the Attorney General of Porto Rico and the undersigned counsel in behalf of the defendant, the Treasurer of Porto Rico, and in answer to the bill of complaint herein filed respectfully allege:

1. On information and belief, defendant denies each and every allegation of paragraph 1 of the complaint, and especially that Angel and Rafael Abarca Portilla, Jose, Coles-tina and Emilia Abarca Saufeliz and Angel Abarca Cor-

tina are subjects of the King of Spain, and that Enrique and Ramon Abarea Sanfeliz are citizens of the United States.

2. Defendant admits paragraph 2 of the complaint.

[fol. 104] 3. Defendant denies that the amount involved in this suit is \$3,000, exclusive of interest and costs.

4. Defendant denies each and every allegation of paragraph 4 of the complaint, except that plaintiffs have their business established in the City of San Juan, which conclusion is accepted.

5. Defendant, in answering paragraph 5 of the complaint, admits the law therein quoted, but denies each and every other allegation of said paragraph, and especially that the sales tax imposed is a tax on property, or is contrary to the Organic Act of Porto Rico.

6. Defendant denies each and every allegation of paragraph 6 of the complaint, except that the sales tax is an excise tax, which conclusion is admitted, but defendant denies that said law is discriminatory or that it has been applied unequally among the different dealers who sell the same articles.

7. In answering paragraph 7 of the complaint, defendant admits the construction therein alleged, that the tax must be paid on the first sale made in Porto Rico, but defendant denies each and every other allegation of the paragraph, and especially that the law is discriminatory and contrary to the Constitution of the United States, or to the Organic Act of Porto Rico.

8. Defendant denies each and every allegation of paragraph 8 of the complaint, and especially the amounts therein alleged, or that the defendant has threatened the plaintiff with attachment or embargo proceedings, or criminal prosecutions, otherwise alleging, on information and belief, that the complainants have been collecting said taxes from the purchasers, and have not turned them into the Treasury of Porto Rico, and defendant especially alleges that the objections raised by plaintiffs against the sales tax are argumentative and unsound, and can only have the effect of obstructing, interfering with and preventing the

enforcement of the law, and creating trouble for the Government in the collection of the tax and the administration of the island.

9. Defendant denies each and every allegation of paragraph 9 of the complaint, and especially that plaintiffs have no adequate remedy at law, or that they will suffer an irreparable injury.

[fols. 105 & 106] 10. Defendant denies each and every allegation of paragraph 10 of the complaint, and especially that plaintiffs will suffer damages in the amount therein alleged, or in any other amount, or that any threats have been made against the complainants in the enforcement of the law.

### Special Defense

As a special defense, defendant alleges that the excise tax imposed and levied according to Section 16, as well as the sales tax imposed and levied in accordance with Section 62 of Act No. 85 of 1925, known as the Internal Revenue Law of Porto Rico, are excises assessed, imposed and collected on the sale of the article, when said article has become part of the mass of property of the taxpayer, and when the possession has been transferred by the sale from the vendor to the vendee, and after the article has acquired a situs in the Island of Porto Rico; that Act No. 85, above mentioned, is an Internal Revenue Law approved by the Legislature of Porto Rico within the powers granted by the Organic Act of 1917, and does not contravene or oppose the Constitution of the United States, which is not per se in force in Porto Rico, nor is it contrary to any of the provisions of the Organic Act above mentioned, or to any federal statutes enforceable in the Island of Porto Rico.

Wherefore, your defendant prays the court to dismiss the bill of complaint herein filed, with costs against plaintiffs, granting any other remedy that the court may deem meet and proper.

San Juan, Porto Rico, October 13, 1925.

George C. Butte, Attorney General of Porto Rico,

J. A. Lopez Acosta, of Counsel.

*Duly sworn to by Juan G. Gallardo. Jurat omitted in printing.*

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[fol. 107] IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY INJUNCTION AND FOR RESTRAINING  
ORDER—Filed October 9, 1925

Now come the above-named complainants and, upon the verified bill of complaint filed herein, move the court for a temporary injunction restraining the above-named defendant, Juan G. Gallardo, who is Treasurer of Porto Rico, and all persons acting by, under and through his authority, during the pendency of the above-entitled action from seizing complainants' property and from prosecuting or threatening to prosecute complainants by reason of complainants' failure or refusal to make and furnish the statements required by Title III of Act No. 85 of the Legislature of Porto Rico, approved August 20, 1925, or from collecting or attempting to collect the sales tax provided in the said Title and Act upon complainants' sales of articles subject to the said tax by the said Act.

Complainants further move the court for a temporary restraining order without notice restraining the above named defendant and all persons acting by, under and through his authority from doing any of said acts the application of complainants for a temporary injunction can be heard on the ground that the Act hereinbefore mentioned has by its terms taken effect and is being enforced by defendant and that before complainants can give notice of an application for a temporary injunction and before such application can be heard complainants will be compelled to expend considerable sums of money in the payment of the taxes or that their property will be seized, as to which complainants are without other adequate remedy and in either case will suffer immediate and irreparable injury.

Henri Brown, Solicitor for Complainants.

[fol. 108] IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER AND ORDER TO SHOW CAUSE—October 9,  
1925

The complainants herein having filed their verified bill of complaint in this court against the defendant above named praying for a temporary and permanent injunction and together with such bill of complaint a motion for a temporary injunction and a restraining order, and this court having duly read and considered the same, it is hereby

Ordered: that Juan G. Gallardo, as Treasurer of Porto Rico, defendant herein, show cause before this court in the court room at San Juan, Porto Rico, on the fourteenth day of October, 1925, at 9 A. M., why a temporary injunction should not issue in accordance with the prayer in said bill of complaint contained.

Let a copy of this order and of the bill of complaint be forthwith served upon the defendant herein named.

San Juan, Porto Rico, October 9, 1925.

Ira K. Wells, U. S. District Judge for Porto Rico.

[fol. 109] IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY—October 14, 1925

These cases came on to be heard on orders to show cause why preliminary injunctions should not issue. Counsel for defendant stated that answers under oath had been filed by defendant in each case denying all material allegations and equities and that defendant was ready to go to trial. Counsel for complainants stated that complainants were willing to commence the trial of the causes provided that defendant would stipulate that he would take no action against complainants to compel payment of taxes pending final decree.

Counsel for defendant stated that he would not make such stipulation. Counsel for complainants then insisted that the motion for preliminary injunction be heard and determined and asked leave to file the affidavits prepared in support of the motion. Thereupon counsel for defendant, after consultation with defendant, stated that defendant was willing to stipulate that he would take no action against

complainants pending suit provided that complainants would file monthly reports of their sales. To this counsel [fol. 110] for complainants agreed. The court then directed that the said stipulation be reduced to writing, signed by counsel for the parties and filed.

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IN UNITED STATES DISTRICT COURT

STIPULATION OF AGREEMENT—Filed October 16, 1925

To the Honorable Ira K. Wells, United States District Judge:

Now come the parties above mentioned, the plaintiffs represented by their attorney, Henri Brown, and the defendant by the Attorney General of Porto Rico and the undersigned counsel, and stipulate and agree as follows:

That in the above entitled cases, now pending trial before the United States District Court for Porto Rico, the defendant, Juan G. Gallardo, will not issue orders to institute criminal proceedings against the persons of the plaintiffs, or issue orders of attachment against their property, and, on the other hand, the plaintiffs agree and stipulate to file the monthly sworn statements required by Sections 63, 64, 65 and 66 of Act No. 85 (Internal Revenue Law of 1925), and also to furnish the information required by the Treasurer in connection with the excise taxes imposed by Section 16 of the Act above referred to. [fols. 111-127] It is understood by the parties that this information is to be furnished only with the object of liquidating the tax, and that none of the parties will forfeit any right, privilege or remedy involved in the cases now before this court.

That this stipulation and agreement shall be effective and valid from the date of its approval by this court, and only until the date of the decision of these cases by this court, and no longer.

San Juan, Porto Rico, October 15, 1925.

George C. Rutte, Attorney General of Porto Rico,  
J. A. Lopez Acosta, of Counsel. J. H. Brown, At-  
torney for Complainant.

Approved. Ira K. Wells, Judge.

## IN UNITED STATES DISTRICT COURT

OPINION—January 8, 1926

WELLS, J.:

All of the questions in this case both of fact and of law were at issue in the case of *J. Ochoa & Hermano v. Juan G. Gallardo*, Treasurer of Porto Rico, being equity case No. 1313, and the decision rendered this date therein settles the questions involved in this case.

For the reasons given in said opinion I find that there is a lack of equity shown in this case and that the complainants have been and are acting in an inequitable manner in regard to these taxes. That the complainants have an adequate remedy at law, and that they have failed to show any irreparable loss or damage. That the taxes complained of are valid and legal in every respect. The petition for injunction is therefore denied and the bill dismissed at the cost of the complainants and a decree will be entered in accordance with this opinion.

Dated at San Juan, Porto Rico, this eighth day of January, A. D. 1926.

Ira K. Wells, Judge.

Opinion, case No. 1313, omitted; printed side page 45 ante.

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[fol. 128] IN UNITED STATES DISTRICT COURT

MOTION TO MODIFY DECREE—Filed January 11, 1926

Now come complainants in the above-entitled cause and respectfully show:

That on January 8, 1926, an opinion was filed by this Honorable Court deciding all questions in issue in the said cause against complainants and directing the entry of a [fol. 129] final decree dismissing the said suit.

That prior to the return day of the order to show cause why a preliminary injunction should not issue, defendant filed an answer to the bill of complaint and on the date set for the hearing of complainants' motion for preliminary injunction counsel for defendant stated that defendant had filed an answer to the complaint denying all of the material

allegations of the bill of complaint and was ready to proceed with the trial of the cause. That thereupon the undersigned counsel for complainants stated that complainants were ready to proceed to trial immediately provided that defendant would stipulate and agree to take no coercive action or proceeding against complainants to compel the payment of taxes then due or to come due, pending the trial and determination of the suit. To this counsel for defendant replied that defendant would not agree or stipulate not to proceed against complainants. Counsel for complainants then insisted that the motion for preliminary injunction should be heard and decided and asked leave to file the affidavits prepared in support of the motion. Thereupon counsel for defendant, after consultation with defendant, stipulated that no action pending suit would be taken by defendant against complainants provided that complainants would agree to file reports showing the amount of their monthly sales. To this counsel for complainants agreed and the stipulation was approved by the court. Complainants understand that the above stipulation only covered the period pending final decree in this court.

That complainants propose to appeal from the final decree in this case as soon as it is entered in order that all questions involved may be reviewed by the Circuit Court of Appeals for the First Circuit. That unless the status quo is preserved pending such appeal or until such time as the Circuit Court of Appeals can hear and decide complainants' motion for an order to preserve the status quo pending appeal, complainants' appeal will be entirely ineffectual inasmuch as defendant will proceed to collect the taxes due by coercive means and complainants will lose all remedy to recover taxes thus coercively paid because the decision [fol. 130] and decree of this court decides all questions against complainants, including those affecting the validity of the taxes.

That complainants will thus suffer irremediable damage and will be subjected to attachments and criminal proceedings unless such action by defendant is stayed pending appeal.

That in order that the Circuit Court of Appeals for the First Circuit may have an opportunity to protect its appellate jurisdiction complainants pray that the proposed decree to be entered herein be modified to restrain all pro-

ceedings against complainants by defendant to collect the taxes involved in this suit for a reasonable time after the entry of the decree, within which time complainants shall present to the Circuit Court of Appeals for the First Circuit a petition for an order staying proceedings by defendant pending the determination of their appeal upon filing a bond in such amount and conditioned as the court may deem proper.

Henri Brown, Counsel for Complainants.

Due service with copy acknowledged this eleventh day of January, 1926, and defendant objects to the motion filed.

George C. Butte, Counsel for Defendant, by L. A. Lopez Acosta, of Counsel.

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#### IN UNITED STATES DISTRICT COURT

#### ORDER ON MOTION TO MODIFY DECREE—January 16, 1926

In this case I am satisfied that the opinion rendered by this court is correct. I am satisfied that the plaintiff has no equity; that he has a plain and adequate remedy at law, and that he has not suffered any irreparable loss or injury, and that the law is constitutional, and that the plaintiff should pay the taxes. Nevertheless, I realize that the plaintiffs have a right to differ with the court, and to take an appeal, and that the Circuit Court of Appeals have a right to hear this matter and decide it in accordance with justice and the facts. Although I am confident that the opinion of this court is right and supported by the law and [fol. 131] the evidence, yet I have no desire to place the plaintiffs or the Court of Appeals in such a position where if they differ from this court they could not grant such relief as the facts and the law justify. It seems to me that it is proper that the Court of Appeals should pass upon this question of supersedeas bond, and while I would not grant a supersedeas bond and do not believe one should be granted, as these suits affect the entire tax levy and it is very important to the people of the island that the government of Porto Rico should receive its taxes with which to operate the government, yet as the Circuit Court of Appeals must pass upon the legality of this law and

upon the correctness or incorrectness of the opinion rendered by the court, I believe that in justice and equity they should also pass upon the question of granting a supersedeas bond, and I am going to amend the decrees in the forty (40) cases decided and grant a stay of thirty (30) days. The order will be made in each one of these forty (40) cases, and the time will not be extended in any case to anybody.

It is further ordered that the plaintiff, within five (5) days from this date, will pay into this court the taxes that are now due and owing the people of Porto Rico under the law in question, and that taxes in the future within five (5) days after they become due, and that such money abide the orders of this court. Failure to so deposit said taxes with the clerk of this court shall be a waiver to any stay granted by this order, and to all rights hereunder.

Done and ordered in open court at San Juan, Porto Rico, this sixteenth day of January, A. D. 1926.

Ira K. Wells, Judge.

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IN UNITED STATES DISTRICT COURT

FINAL DECREE—JANUARY 18, 1926

This cause came on to be heard for final hearing on the 23d day of October, A. D. 1925, all parties appearing by counsel; and the evidence being closed, the case was thereupon submitted to the court upon written briefs filed by the parties.

And having considered the pleadings, the evidence and [fol. 132] the briefs of counsel, the court finds that all the equities in this cause are with the defendant, Juan G. Galardo, Treasurer of Porto Rico; that there is a lack of equity shown by complainants in this case and that complainants have been and are acting in an inequitable manner in regard to the taxes sought to be enjoined in their bill of complaint herein; that complainants have an adequate remedy at law as to the matters complained of and that they have failed to show any irreparable loss or damage. The court further finds that the taxes, as demanded of complainants by defendant, and which are complained

of in the bill of complaint herein, are valid and legal in every respect.

It is therefore ordered, adjudged and decreed that the petition for injunction in this cause to restrain the defendant, Juan G. Gallardo, Treasurer of Porto Rico, from assessing and collecting from complainants the taxes provided under Act No. 85 of the Legislature of Porto Rico, approved August 20, 1925, be and the same is hereby denied; and that the bill of complaint be herewith dismissed. It is further ordered, adjudged and decreed that the complainants pay all costs herein.

A stay of proceedings under this decree for 30 days from the entry hereof is granted to complainants to allow them to present a motion for supersedeas to the Circuit Court of Appeals for the First Circuit; on condition that plaintiffs shall pay into this court, within five days, all taxes now due to the government of Porto Rico under the act complained of, as shown by the returns filed and to be filed under the law, and shall continue to pay into the court such amounts as shall become due under said Act in the future until said application for supersedeas is decided.

Done at San Juan, Porto Rico, this eighteenth day of January, 1926.

Ira K. Wells, Judge.

#### IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY—October 23, 1925

This case comes on to be heard upon its merits. J. Henri Brown, Esq., appears as attorney in behalf of the complainants and Honorable George C. Butte, Attorney General of Porto Rico, and J. A. Lopez Acosta, Assistant Attorney General, appear in behalf of the defendant. The court hears the testimony in behalf of the complainants and the defendant introduces documentary evidence. The argument of the case is continued.

**Statement of Evidence**—Filed January 30, 1926

## CAPTION

Be it remembered, that this case came on for trial on the bill and answer before the Honorable Ira K. Wells, Judge of the District Court of the United States for Porto Rico, sitting at San Juan, Porto Rico, on the twenty third day of October, 1925, complainants being represented by Henri Brown, Esq., and defendant by Mr. George C. Butte, Attorney General of Porto Rico, and J. A. Lopez Acosta, Esq., Assistant Attorney General.

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Whereupon, the trial of the case was commenced and the following testimony produced and the proceedings had, as follows:

ANGEL ABARCA PORTILLA, being called as a witness on behalf of complainants, was duly sworn and testified as follows:

## Direct examination by Mr. Brown:

I live in Santurce, Porto Rico. My business is industries and commerce. I am associated in business with my managing partner Rafael Abarca Portilla, and silent partners Angel Abarca Cortina; Ramon Abarca, Enrique Abarca, Emilia Abarca, Celestina Abarca, and Maria Diaz viuda de Abarca. The managing partners are myself and Rafael Abarca.

I am a subject of Spain and my brother, the other managing partner, is also Spanish. Some of the silent partners are American. Enrique and Ramon Abarca are American citizens. The others are Spanish.

The business in which my firm is engaged is repairs and construction of buildings, machinery for steamers and sugar centrals and all kinds of industries, as well as the sale of materials for the same purposes. We sell iron, copper and brass rods; plates of the same materials; piping for both steam and water and accessories for the same, packings, bolts, abestos, fire clay, screws, rivets, and all the various articles that are concerned with such things. The amount of our annual sales of these articles depends; for

[fol. 134] instance, last year they amounted to about \$325,000. Some years we sell more and some years less, the sales fluctuate. Our business year ends on the 28th of February. Our sales this year since February up to the present time are about the same as last year, more or less.

We filed a sworn statement with the Treasury Department as to our sales for the last eleven days of August. I do not remember how much those sales amounted to. We filed a similar report for the month of September. I do not remember how much that amounted to; \$8,647.11 for August and for September it was \$28,522.50. I cannot state definitely whether we paid or not the September sales tax, but I think we did. I am not familiar with that. If it is within the law to pay I think it has been paid. The value of our stock in trade probably is about \$150,000.

We constantly have shipments from the United States. The value of merchandise that we have purchased that is still pending delivery is approximately twenty five or thirty thousand dollars. Among the articles that we sell there are many that if we have to pay the two (2) per cent sales tax on the sale thereof we would lose money; for example, belts, ammonia, galvanized water pipes and parts. There are others which I cannot recall just now.

Cross examination by Mr. Butter:

We try to collect the two per cent sales tax from our customers. We have collected very little because we sell most of our goods on long term credit. We have charged the two (2) per cent on our books against our customers in all cases of credit sales.

Redirect examination by Mr. Brown:

Probably in many cases we will not be able to collect any of those charges of two (2) per cent that we have made for the taxes, and in others perhaps we will.

Defendant offered in evidence certified copies of the declarations of sales filed in the office of the Treasurer of Porto Rico by the complainants under Act of August 20, 1925, for the months of August and September, 1925, which were admitted in evidence and marked "Defendant's Exhibits A 1" and "A 2."

[fol. 135] The said documents are in words and figures as follows:

EXHIBIT A-1, DEFENDANT

San Juan, P. R. Sucs. de Abarca. Folio No. 2185.  
Miramar, San Juan

Declaration of Sales, Month of August, 1925

Month	Day	Sales	Value
	1.		
	2.		
	3.	1. Juan G. Gallardo, Treasurer of	
	4.	Porto Rico, do hereby certify that this is	
	5.	a true and correct copy of the declara-	
	6.	tion of sales rendered by the firm of Sucs.	
	7.	de Abarca, covering August 20th to 31st,	
	8.	inclusive, and subject to the 2% sales	
	9.	tax prescribed by section 62, Act 85, ap-	
	10.	proved August 20th, 1925.	
	11.	Juan G. Gallardo, Treasurer.	
	12.		
	13.		
	14.		
	15.		
	16.		
	17.		
	18.		
	19.		
	20.		
	21.		
	22.	Invoice.	
	23.		
	24.	A 12694 #12788.	
	25.		
	26.		
	27.	20th to 31st.	
	28.		
	29.		
	[fol. 136]	30.	
	31.		
		Total amount of sales	\$8,647 11

[On margin: Attach and cancel here the corresponding Internal Revenue Stamps.

Internal Revenue stamps in the amount of \$172.94 have been affixed and cancelled on the original hereof.

Liquidation \$8,647.11 at 2%—\$172.94]

### Oath

I, Angel Abarea, after being duly sworn, certify: That the above declaration contains a true and exact list of the total amount of sales, cash and credit, made during the month of August, from the 20th to the 31st, 1925, and that the amount of the stamps attached and cancelled hereon represents the tax which I should pay in accordance with section 62 of the Internal Revenue Law of Porto Rico, approved August 20, 1925.

Angel Abarea, Taxpayer or Representative.

Subscribed and sworn to before me this 10th day of August, 1925. (Signature of person taking oath:)

R. Díaz Collazo, (official title:) Notary Public.

[A 25 cents Internal Revenue stamp cancelled hereon.]

### EXHIBIT A-2, DEFENDANT

San Juan, P. R. Sucesores de Abarea. Folio No. 2186.  
Santurce, P. R.

### Declaration of Sales, Month of September, 1925

Month	Day	Sales	Value
	1.		
	2.		
	3.		
[fol.137]	4.	I, Juan G. Gallardo, Treas-	
	5.	urer of Porto Rico, do hereby certify	
	6.	that this is a true and correct copy of	
	7.	the declaration of sales rendered by the	
	8.	firm of Sucs. de Abarea, covering Sep-	
	9.	tember 1st to 30th, inclusive, and sub-	

Month	Day	Sales	Value
	10.	ject to the 2% sales tax prescribed by	
	11.	Section 62, Act 85, approved August	
	12.	20th, 1925.	
		Juan G. Gallardo, Treasurer of	
		Porto Rico.	
	13.		
	14.		
	15.		
	16.		
	17.		
	18.		
	19.		
	20.		
	21.		
	22.		
	23.		
	24.		
	25.	Invoice No. 1.	
	26.		
	27.	A12789 A13313.	
	28.		
	29.		
	30.		
	31.		
		Total amount of sales	\$28,522.50

[On margin: Attach and cancel here the corresponding Internal Revenue Stamps.

Liquidation \$28,522.50 at 2% \$570.45.]

#### Oath

I, Angel Abarea, after being duly sworn, certify: That the above declaration contains a true and exact list of the total \* [fol. 138] amount of daily sales, cash and credit, made during the month of September, 1925.

Angel Abarea, Taxpayer or Representative.

Subscribed and sworn to before me this 10th day of October, 1925. Signature of person taking oath: R. Diaz Collazo; official title: Notary public.

[A 25 cents Internal Revenue stamp cancelled hereon.]

It is hereby stipulated and agreed that the above statement of the evidence is a true and accurate statement of the evidence taken at the trial of this case.

Henri Brown, Solicitor for Complainants. George  
C. Butte, Solicitor for Defendant.

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JUDGE'S CERTIFICATE TO STATEMENT OF EVIDENCE

The above statement of the evidence is hereby by consent approved as a true and accurate statement of the evidence taken at the hearing of this case.

January 30, 1926.

Ira K. Wells, District Judge.

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IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed  
January 30, 1926

To the Honorable Ira K. Wells, Judge of the said Court:

The above-named complainants, feeling themselves aggrieved by the decree made and entered in this cause on the eighteenth day of January, 1926, do hereby appeal from said decree to the Circuit Court of Appeals for the First Circuit, for the reasons specified in the assignment of errors which is filed herewith, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, [fol. 139] may be sent to the United States Circuit Court of Appeals for the First Judicial Circuit, sitting at Boston, Massachusetts.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made.

San Juan, P. R. January 27, 1926.

Henri Brown, Solicitor for Complainants.

The petition granted and appeal allowed upon giving bond conditioned as required by law in the sum of three hundred dollars (\$300).

San Juan, P. R., January 30, 1926.

Ira K. Wells, Judge.

IN UNITED STATES DISTRICT COURT

NOTE RE ASSIGNMENT OF ERRORS.—Filed January 28, 1926

[MEMORANDUM.—Being identical with the assignment of errors in No. 1951, printed at page 52, this assignment of errors is here omitted. A. I. Chatton, Clerk.]

Bond on appeal for \$300.00, approved and filed February 2, 1926, omitted in printing.

[fol. 140] Citation in usual form, showing service on Juan G. Gallardo, omitted in printing.

[fol. 141] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE AS TO DEPOSIT

I, Antonio Aguayo, clerk of the District Court of the United States for Porto Rico, do hereby certify that on the twentieth day of January, A. D. 1926, the complainant, Sues, de Abarea, deposited in the registry of this court the sum of two thousand two hundred and twenty-two and 98/100 dollars (\$2,222.98), as required by the order of this court of January 16, 1926.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at San Juan, in said District, [fol. 142] this third day of February, A. D. 1926, and in the 150th year of the Independence of the United States of America.

Antonio Aguayo, Clerk of U. S. District Court for Porto Rico.

## IN UNITED STATES DISTRICT COURT

PRECIPUE FOR TRANSCRIPT OF RECORD—Filed February 2, 1926

To Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico:

Please prepare a transcript of the record in this case to be filed in the office of the clerk of the United States Circuit Court of Appeals for the First Judicial Circuit under the appeal taken herein and insert in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Bill of complaint.
2. Motion for preliminary injunction and restraining order.
3. Order to show cause.
4. Answer to bill of complaint.
5. Journal entry of October 14, 1925.
6. Journal entry of trial.
7. Stipulation filed October 16, 1925.
8. Opinion and journal entry of January 8, 1926.
9. Motion to modify proposed decree.
10. Order, January 16, 1926.
11. Final decree.
12. Statement of evidence.
13. Petition for appeal.
14. Order allowing appeal.
15. Assignment of errors.
16. Bond on appeal.
17. Citation.
18. Certificate of clerk as to payments made into the clerk's office under decretal stay order.
19. This precipue.
- [fol. 143] 20. Certificate of clerk of court certifying accuracy of record.

San Juan, P. R., February 2, 1926.

Henri Brown, Solicitor for Complainants Appellants.

Receipt of copy of foregoing precipue hereby acknowledged.

San Juan, P. R., February 2, 1926.

George C. Butte, Solicitor for Defendant, by Jas. R. Raverley, of Counsel.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 144] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed February 3, 1926

Now come the above named complainants and state that in the record, proceedings and final decree entered in this cause manifest error has been committed to their prejudice, to wit:

1. The court erred in holding that on the allegations of the bill and facts proven complainants are out entitled to equitable relief.

2. The court erred in hold that complainants have an adequate remedy at law.

3. The court erred in refusing or failing to hold that complainants have no adequate remedy at law in the District Court of the United States for Porto Rico.

4. The court erred in holding that complainants had failed to show irreparable damage resulting from the acts sought to be enjoined.

5. The court erred in holding that complainants had been guilty of inequitable conduct and that they did not come into equity with clean hands.

6. The court erred in refusing and failing to hold that defendant's construction of the Sales Tax Law, Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, as imposing the two per cent sales tax on first sales in Porto Rico only, is erroneous and that the enforcement of said law against complainants upon such erroneous construction is without warrant in the law.

7. The court erred in holding that the Sales Tax Law, Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, as construed and enforced by defendant does not discriminate against the manufactures and products of the several States and foreign countries and in favor of domestic or Porto Rican manufactures and

[fol. 144a] products in that while the tax is imposed and collected on sales by wholesalers and retailers of articles manufactured and produced outside of Porto Rico, no tax is imposed on sales of wholesalers and retailers of domestic manufactures and in that as to domestic products the tax is assessed on the manufacturer's or producer's sales price while as to non-domestic products and manufactures the tax is assessed on the wholesaler's and retailer's sales price.

8. The court erred in failing to hold that the sales tax levied by defendant under his construction of Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, upon complainant's sales of merchandise manufactured outside of Porto Rico, is in contravention of the commerce clause of the Constitution of the United States.

9. The court erred in failing to hold that the sales tax levied by defendant under his construction of Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, upon complainants' sales of merchandise manufactured outside of Porto Rico, is violative of the provisions of the present Organic Law of Porto Rico and those of the first Organic Act continued in force prohibiting the taxation of imports.

10. The court erred in failing to hold that the classification made by defendant's construction of the said Sales Tax Law, Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, into domestic and non-domestic articles for the purpose and with the effect of assessing the two per cent sales tax on different bases of valuation as to each class violates the provisions of the Fourteenth Amendment to the Constitution of the United States.

11. The court erred in holding that the Sales Tax Law, in Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, is not invalid for repugnancy to the provisions of the Fourteenth Amendment to the Constitution of the United States because of exemption of certain sales, articles and persons in and by Section 83 of

the said law, which exempts members of the class selected [fol. 144b] and defined by the Legislature for the imposition and levy of the said tax from liability to the said tax.

12. The court erred in refusing and failing to hold that the said Sales Tax Law, Title III of the Internal Revenue Law of Porto Rico, approved August 20, 1925, is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States because of absence of classification or of a classification based upon reasonable differences and substantial distinctions.

13. That the court erred in refusing to grant a permanent injunction.

14. That the decree is contrary to law.

15. For other errors appearing on the record.

Wherefore, complainants pray that the said decree be reversed and the District Court of the United States for Porto Rico be instructed to enter such decree as is prayed for in complainants' bill.

Henry Brown, Solicitor for Complainants.

[fol. 145] IS UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIRST CIRCUIT, OCTOBER TERM, 1925

No. 1903

INSULAR MOTOR CORPORATION, Plaintiff Appellant,

v.

JUAN G. GALLARDO, Treasurer, Defendant Appellee

No. 1904, T. H. SMALLWOOD et al. v. SAME

No. 1908, ABOLFO VALDES ORDOÑEZ et al. v. SAME

No. 1923, ALFONSO ALVAREZ RODRIGUEZ et al. v. SAME

No. 1924, ENRIQUE ZORRILLA et al. v. SAME

No. 1940, ENRIQUE ZORRILLA et al. v. SAME

No. 1941, ABOLFO VALDES ORDOÑEZ et al. v. SAME

No. 1942, T. H. SMALLWOOD et al. v. SAME

No. 1943, INSULAR MOTOR CORPORATION v. SAME

No. 1944, ABOLFO VALDES et al. v. SAME

- No. 1945, ANTONIO RULLAN et al. v. SAME  
 No. 1946, MARIANO RODRIGUEZ et al. v. SAME  
 No. 1947, JOSE LEON et al. v. SAME  
 No. 1948, PRIMITIVO FRANCO et al. v. SAME  
 No. 1949, FINLAY, WAYMOUTH & LEE, INC., v. SAME  
 No. 1951, RAFAEL FABIAN et al. v. SAME  
 No. 1952, ANDRÉS GARCÍA et al. v. SAME  
 No. 1953, JOSE RODRIGUEZ et al. v. SAME  
 1954, GABINO SANCHEZ COTIERA et al. v. SAME  
 No. 1955, ANGEL ABARCA PORTILLA et al. v. SAME  
 No. 1956, FRANCISCO FORTIÇA et al. v. SAME  
 No. 1957, ANTONIO VICENS MAGRANER et al. v. SAME  
 No. 1958, PEDRO BONNIN et al. v. SAME  
 No. 1959, JUAN COLOM et al. v. SAME  
 No. 1960, GABRIEL TORRES et al. v. SAME  
 No. 1961, TOMAS ESTAPE et al. v. SAME  
 No. 1962, JUAN CABELL, JR., et al. v. SAME  
 No. 1963, MANUEL VIDAL ALVAREZ et al. v. SAME  
 No. 1964, JOSE B. ALVAREZ et al. v. SAME  
 [fol. 146] No. 1965, FERNANDO LUIS TORO et al. v. SAME  
 No. 1966, EUGENIO RODRIGUEZ et al. v. SAME  
 No. 1967, PEDRO JUAN ARMSTRONG et al. v. SAME  
 No. 1968, FEDERICO TORO et al. v. SAME  
 No. 1969, PEDRO FULLANA et al. v. SAME  
 No. 1970, HENRY PARACCHINI et al. v. SAME  
 No. 1971, MIGUEL ROSILLO et al. v. SAME  
 No. 1972, FRANCISCO GAVILAN GUILDA et al. v. SAME  
 No. 1973, RAFAEL TORRES ALBERTI et al. v. SAME  
 No. 1974, JOSE DURAN ESMOLIS et al. v. SAME  
 No. 1975, RAMON ARDONA et al. v. SAME  
 No. 1976, FRANCISCO BAGES QUINONES et al. v. SAME  
 No. 1977, JUAN BATZA et al. v. SAME  
 No. 1978, ANTONIO VIVANTE PACHECO et al. v. SAME

Appeals from the District Court of the United States for  
 the District of Porto Rico

Before Bingham, Johnson and Anderson, JJ.

## JOHNSON:

All these cases raise the question whether the District Court of the United States for Porto Rico had equitable jurisdiction because the complainants did not have a plain, adequate and complete remedy at law.

July 28, 1923, the Porto Rican Legislature enacted a law whose title is: "The excise tax law of Porto Rico." Under Title 2, part 1, sec. 20, the Act provided for the levying and collection, at one time only, of an Internal Revenue tax upon a long list of articles "produced, manufactured, sold or consumed in Porto Rico."

Section 33 of the Act is as follows:

"The tax hereby prescribed on articles for sale, use, consumption or exhibition in Porto Rico, except as provided in section 20 of this Act (which relates to the tax upon articles manufactured or produced in Porto Rico) shall be levied as soon as they are on the market in possession of a dealer or commission merchant or the representative thereof in this island, who shall be responsible for the payment of said taxes upon transferring said articles to another [fol. 147] other dealer or consumer, or upon acquiring them or having them in his possession, and who shall pay said taxes in one of the two following forms in accordance with such regulations as the Treasurer of Porto Rico may prescribe for the purpose: (a) Upon acquiring the taxable articles and having them in his possession, by making entries of receipt and delivery in the stock and receipt and delivery book, and by simultaneously paying the tax by cancelling the corresponding stamps on an internal revenue invoice; or (b) as he disposes of the taxable articles. Persons acquiring taxable articles through channels other than the aforesaid dealers or commission merchants or their representatives, shall pay said taxes as soon as they obtain possession of the articles and in accordance with the definition of *ad valorem* contained in this Act.

"Dealers shall be responsible for the payment of said taxes when they sell any taxable article to a consumer. The consumer shall be responsible for the payment of said

tax when he acquires taxable articles, if such tax shall not have been paid."

Section 35 provides in part as follows:

"From and after the date on which this Act takes effect, every person, who, by himself or through his agents or representatives, acquires taxable articles for sale or transfer to another merchant or consumer, and on which the taxes specified by this Act have not been paid, shall keep in his commercial establishment, from which it shall not be removed, except by authorization of the Treasurer of Porto Rico, an official book wherein entries shall be made of all taxable articles at the time they are acquired, and the corresponding entry at time of selling or otherwise disposing of them, and further, furnish all other information that the Treasurer of Porto Rico may by regulation prescribe for the purpose of determining the value and other circumstances in connection with such articles."

Some of these cases pray for an injunction to restrain the Treasurer of Porto Rico from collecting taxes levied under the provisions of this Act.

By an Act approved August 20, 1925, the Legislative Assembly of Porto Rico enacted a law to supersede the Act of 1923, but providing that taxes due under the law repealed (Vol. 148) should remain in force and the Treasurer of Porto Rico be empowered to make collection thereof in the same manner as provided in the repealed laws. Under this Act of 1925 a tax was authorized to be levied upon a long list of articles "sold, transferred, used or consumed in Porto Rico." The tax imposed by this Act is attached as illegal in the other cases and an injunction is sought to prevent its collection.

June 23, 1924, the Legislative Assembly of Porto Rico passed a law entitled, "An Act providing for the payment of taxes under protest," etc., as follows:

"Section 1. Whenever a taxpayer believes that he should not pay a tax or part thereof because he understands that it is illegal, excessive or wrongful, he shall, however, have the obligation to pay the same in full upon request of the collector of taxes of his district, or of the official in charge of the collection of taxes, and shall ask the said collector

or the said official in charge of the collection of taxes, should he desire to make any claim, to endorse the tax receipt specifically stating whether the said protest refers to the whole or to a part of the tax paid under protest, and setting forth the exact amount protested. The said endorsement shall be signed by the taxpayer and by the collector or officer in charge of the collection of taxes.

"Section 2. After payment is made, the collector of taxes or the official in charge of the collection of taxes, shall cover the sum collected into the Treasury of Porto Rico, reporting to the Treasurer the total amount of the tax, as well as the part thereof paid under protest.

"Section 3. The moment that a tax paid under protest is received, the part thereof not protested, if there be any, shall be considered as all other receipts from taxes, the amount of which is to be applied to the obligations of the Insular Government, and in the case of property taxes the part of said tax pertaining to the respective municipalities pursuant to law, shall be paid over to them. The protested part shall be covered into a special fund to be known as 'Taxes paid under protest—Trust Fund.'

"Section 4. A tax payer who shall have paid under protest the whole or part of any tax shall, within a term of not to exceed thirty days from and after the date of payment, sue the Treasurer of Porto Rico in a court of competent jurisdiction to secure the return of the amount protested. The Treasurer of Porto Rico, through the Attorney General or through the official designated by the latter from his department, shall answer the said suit within the term granted by law for the filing of answers and shall make therein, in their order, allegations to strike out particulars of the complaint and demurrers.

"When the case is ready for trial the court before which the action is pending shall fix the day for the trial thereof without the necessity of a request from the parties, first serving due notice on them.

"When final decision is rendered, if favorable to the taxpayer, the Treasurer of Porto Rico shall proceed to return to him the amount directed in the decision to be charged against the fund 'Taxes paid under protest—Trust Fund,' referred to in section 3 hereof.

"If the decision be favorable to The People of Porto Rico the Treasurer shall cover from the fund known as 'Taxes paid under protest - Trust Fund,' into the proper fund such amount of the tax as directed by the court in its decision, turning over to the respective municipalities the proportion established by law in cases of property taxes.

"Section 5. Either party may appeal to a higher court by filing in the court a *quo* his appeal within ten days after the decision is rendered, as provided by section 4 of this Act; provided, that if the taxpayer be the appellant he shall file, together with the petition for appeal and in the court appealed from, a bond in such sum as the court shall fix to answer for such costs, expenses, and damages as The People of Porto Rico might suffer by reason of said action.

"The said appeal shall be prosecuted pursuant to the provisions of law for appeals in civil cases, and the court of appeals shall hold the hearing with preference over any other matter pending before it.

"Section 6. Any taxpayer filing a suit against the Treasurer of Porto Rico in accordance with the provisions of this Act shall attach to the said suit a receipt for the tax paid under protest, or a certified copy of said receipt.

"Section 7. That the sum of fifteen thousand (\$15,000) dollars or such part thereof as may be necessary is hereby appropriated, out of any funds in the Insular Treasury, [Vol. 120] not otherwise appropriated, for the payment by the Treasurer of Porto Rico of such costs as by judgment of any competent court may be allowed to any taxpayer who shall have brought suit pursuant to this Act.

"Section 8. Act No. 17 of May 15, 1929, as well as all laws or parts of laws in conflict herewith are hereby repealed; provided, that any action, proceeding or right arising from and exercised under the Act hereby repealed, shall continue under the protection and provisions thereof until its termination.

"Section 9. It is hereby declared that an emergency exists for the immediate taking effect of this Act, and therefore the same shall take effect immediately after its approval."

This Act does provide a plain, adequate and complete remedy at law for the recovery of taxes paid under protest,

and which was open to the appellants in all of these cases before us. The District Court so held and we think this was correct.

In *West India Oil Co. v. Gallardo*, 6 Fed. (2d) 227, 70 Porto Rican Act of 1923 was under consideration as well as the remedy at law which was afforded by the Public Acts of Porto Rico passed in 1920. It was there pointed out that the protesting taxpayer who afterwards attempted to recover a tax paid under protest must annex to his complaint "a certificate from the office of the Treasurer, setting forth that he has paid all his taxes," and it was there held that the right to sue under such conditions did not constitute a plain and adequate remedy at law.

The objectionable features which were pointed out were eradicated by the Act of June 23, 1924.

There was no occasion, therefore, for the District Court to consider other questions after having found that the taxpayer had a plain, adequate and complete remedy at law in all of these cases, and all should have been dismissed, leaving the appellants to their remedy at law for the recovery of taxes paid under protest. The appellants, while admitting that the illegality or unconstitutionality of a tax is not of itself ground for equitable relief in the courts of the United States, still claim that additional conditions are alleged which would give the Federal Court equitable jurisdiction.

That the illegality or unconstitutionality of a law is not (fol. 151) sufficient ground for equitable relief has been many times stated by the Supreme Court.

In *Rouse Artesian Water Co. v. Rouse City*, 213 U. S. 276, 282, the court said:

"It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States." \* \* \* and that, "in order to give equity jurisdiction there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction, before the remedy by injunction can be awarded. The leading case on this subject is *Dows v. Chicago*, 11 Wall. 108."

In *Dodge v. Osborn*, 240 U. S. 118, in which the legality and constitutionality of the income tax law of 1913 was attacked, on the ground that, unless the collection of taxes assessed under this law was enjoined, many suits would be brought for the recovery of taxes and that, as the income tax law made the tax a lien upon the taxpayer's property, the assessment of taxes would constitute a cloud on his title. The court said:

"But these allegations are wholly inadequate under the hypothesis which we have assumed solely for the sake of the argument to sustain jurisdiction, since it is apparent on their face they allege no ground for equitable relief independent of the mere complaint that the tax is illegal and unconstitutional and should not be enforced—allegations which if recognized as a basis for equitable jurisdiction would take every case where a tax was assailed because of its unconstitutionality out of the provisions of the statute and thus render it nugatory, while it is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable."

The interference of the courts of the United States by injunction with the collection of taxes by a state or with its administration of matters of internal policy can only be justified in a plain case not otherwise remediable. *Arkansas Building Association v. Madden*, 175 U. S. 269, 273. See also *Long v. Norman et al.*, 289 Fed. 5, a case in this Circuit.

It was the purpose of the Foraker Act and the Jones Act which succeeded it to confer sovereignty upon Porto Rico and an autonomy similar to that of the States. *Gromer v. Standard Dredging Co.*, 224 U. S. 362; *Porto Rico v. Rosaly*, 227 U. S. 270.

The right to tax, for the purposes of government, one of the attributes of sovereignty was conferred upon Porto Rico by Congress and there is a stronger reason for applying the above rule to Porto Rico than to the States, in order that it may not be hampered and obstructed in raising revenue for the administration of its government. Congress has recognized the necessity of preventing the embarrassment of the United States in the collection of taxes as-

sessed under the Internal Revenue laws by enacting section 3244 R. S., providing that, "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

While we think this section is not applicable to Porto Rico, as pressed upon us in argument, yet, the principle involved is, and there are as strong reasons for its application to Porto Rico as to the United States.

We have therefore reached the conclusion that all these cases should be remanded to the District Court of Porto Rico with instructions to dismiss them for want of equitable jurisdiction, without prejudice to the right of the appellants to bring actions at law in accordance with the provisions of the Act of June 23, 1924, and the amendments thereto.

The decree of the District Court is affirmed in each case, with costs in this court to the appellee.

[fol. 153] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

[fol. 154] PETITION FOR REHEARING

Come now the appellants and respectfully petition this Honorable Court to vacate the judgments entered in the [fol. 155] above-entitled causes on September 25, 1926, and grant a rehearing upon the following grounds:

1. The Court has overlooked, and has decided directly contrary to, its own previous decision in *Camunas vs. Porto Rico Railway, Light & Power Co.*, 272 Fed. 924, in which the Court, upon careful consideration, expressly decided that a suit at law against the Treasurer of Porto Rico to recover taxes paid under protest is not such an adequate remedy at law as will defeat equitable jurisdiction.

The appellants relied upon that decision in bringing these suits, and it is unjust to prejudice them because of that reliance by now announcing a different rule.

Moreover, there are at least nine other causes now upon the docket of this court, to be argued at the coming January, 1927, session, in which the same question will be presented.

2. The Court has overlooked, and has decided directly contrary to, *Risty vs. Chicago, R. I. & P. Ry. Co.*, decided March 1, 1926, for this reason: The Porto Rican statutes expressly confine a taxpayer to the Insular courts, and exclude him from the Federal Court in suing for the recovery of a tax paid under protest. And in that case the Supreme Court of the United States expressly held that a remedy at law which may not be availed of in a Federal Court is not such an adequate remedy at law as will defeat equitable jurisdiction.

3. The decision in these causes is also contrary to *Hill vs. Wallace*, 259 U. S., 44, 62; *Union Pacific R. R. Co. vs. Weld County*, 247 U. S., 282; *Ohio Tax Cases*, 232 U. S., 576, 587; *Benedicto vs. West India & Panama Telegraph Co.*, 296 [vol. 156] Fed., 417, 421; *Benedicto vs. Porto Rican American Tobacco Co.*, 296 Fed., 422, 425; none of which is cited in the opinion of this court in these causes.

4. The Court has overlooked essential differences between these causes and *Boise Artesian Water Co. vs. Boise City*, 213 U. S., 276, and *Dodge vs. Osborn*, 240 U. S., 118, and *Long vs. Norman*, 289 Fed., 5, and has erroneously applied the principles of those decisions.

5. The Act of June 23, 1924, referred to in the opinion does not afford an adequate remedy because it does not provide for interest.

6. The judgments which this court has entered are such that the appellants cannot effectively pursue their alleged remedy at law, and there is grave danger that they will be forced to suffer a huge money loss merely because they relied upon this court's decision in the *Camunas* case, cited *supra*.

In specification of the foregoing, the Court's attention is respectfully called to the following comment:

# I

In *Camunas vs. Porto Rico Ry. I. & P. Co.*, 272 Fed., 924, decided by this Court in 1921, a suit in equity to enjoin the collection of assessments under the Porto Rican Workmen's Compensation Act was resisted upon the

ground, among others, that the plaintiff had a complete and adequate remedy at law. In rejecting that contention this Court, per Anderson, J., said (p. 927):

[fol. 157], "We think the defendants' contention that the plaintiff has a plain and adequate remedy at law cannot be sustained. The case is, on the facts, easily distinguishable from that of *Camunas vs. New York & P. R. S. S. Co.*, 294 Fed., 40, 49, 171 C. C. A., 76. Moreover, the views expressed in that case, to the effect that the employer had a plain and adequate remedy at law for any unlawful assessment under the Workmen's Compensation Act, were grounded upon the language of section 3 of the Porto Rican Act of March 9, 1911, entitled 'An Act to provide for the payment of taxes under protest,' which provides in explicit terms that the party paying under protest may 'sue the said treasurer . . . in a court having competent jurisdiction thereto.' On the record then before the court there was no reason suggested for construing the words 'in a court having competent jurisdiction thereto' as not being broad enough to cover the federal court, if, by reason of diversity of citizenship or other ground for federal jurisdiction, the party alleging wrongful assessment had a right to resort to the federal court. Neither the Act of April 13, 1916, entitled 'An act to authorize suits against the people of Porto Rico,' nor the decisions of the Supreme Court of Porto Rico in *Sauri & Subira vs. Sepulveda*, 25 P. R., 224, and *Union Life Insurance Co. vs. Gromer*, 20 P. R. 80, were brought to the attention of the court. As it now appears that the Supreme Court of Porto Rico has construed the statute authorizing suits against the treasurer as suits against Porto Rico, and therefore permissible only to the extent authorized by the sovereign power (*Porto Rico vs. Rosaly*, 227 U. S., 270, 33 Sup. Ct., 352, 57 L. Ed., 507), and as under section 10 of the Act of April 13, 1916, it is provided 'that all such cases shall be brought only in the inferior district courts', it is plain that the remedy for the recovery of taxes, paid under protest, under section 3 of the Act of March 9, 1911, is not an adequate remedy for a party having otherwise a right to resort to the federal court (*Smyth vs. Ames*, 169 U. S., 496, 516, 517, 18 Sup. Ct., 418, 42 L. Ed., 819; *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 362, 391, 14 Sup. Ct., 1062, 38 L. Ed.,

1031; *Benedicto vs. Porto Rican American Tobacco Co.*, 256 Fed., 422, 425, 167 C. C. A., 550, and cases cited)."

The Act of April 13, 1916, there referred to, is still in force, and is as applicable to the Act of 1924 as it was to the Act of 1911. Moreover, the Act of June 23, 1924, quoted in the opinion in these causes, itself clearly requires that the suit against the Treasurer there authorized must be brought in an insular court and not in a federal court. It says that the taxpayer may "sue the Treasurer of Porto Rico in a court of competent jurisdiction" and that is the precise phrase which was used in the Act of March 9, 1911, referred to in the *Camunas* case, *supra*, and the precise phrase which has been held not to be broad enough to cover a suit in the federal court. The Act of June 23, 1924, also regulates the procedure in detail. It says that the Treasurer shall answer the suit "within the term granted by law for the filing of answers and shall make therein, in their order, allegations to strike out particulars of the complaint and demurrers." It provides that when the case is ready for trial the court in which it is pending "shall fix the day for the trial thereof without the necessity of a request from the parties, first serving due notice on them." Certainly the Legislature of Porto Rico was not undertaking to tell the United States District Court how it should proceed in [fol. 159] any cause brought before it. The Act further provides that an appeal must be taken within ten days, that if the taxpayer be the appellant he must file a bond, that the appeal "shall be prosecuted pursuant to the provisions of law for appeals in civil cases," and that the appellate court "shall hold the hearing with preference over any other matter pending before it." Certainly this Court does not mean to say that the Legislature of Porto Rico was telling it how and when it shall hear its cases.

There thus can be no escape from the conclusion, deliberately pronounced in the *Camunas* case, that the remedy of paying the tax and suing the Treasurer to recover it back is available in the insular courts only and not in the federal court.

It is likewise impossible to escape the conclusion, also announced by this Court in the *Camunas* case, that such a remedy "is not an adequate remedy for a party having otherwise a right to resort to the federal court."

The decision here is thus utterly contrary to the decision in the Camunas case.

## II

In the recent case of *Risty vs. Chicago, R. I. & P. Ry. Co.*, decided March 1, 1926, the Supreme Court of the United States reiterated the rule that "the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the State court." Consequently, for this Court now to say that these causes cannot be maintained in equity because of the remedy provided by the Porto Rican Act of June 23, 1924, is to go directly contrary to that decision of the Supreme Court.

[101, 160]. We quote from the *Risty* case as follows:

"The assessment, if made, would have established a lien on the appellee's property which would be a cloud on title

to say nothing of the fact that the effect of the pending proceeding would have been to subject their property to future assessments; hence the case was one for equitable relief unless there was a plain and adequate remedy at law. *Ohio Tax Cases*, 232 U. S., 576; *Shaffer vs. Carter*, 252 U. S., 37, 46; *Chicago, B. & Q. R. R. vs. Osborne*, 265 U. S., 14. The remedy by appeal to the State court under §469 does not appear to be co-extensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. *Smyth vs. Ames*, 169 U. S., 466; *Chicago, B. & Q. R. R. Co. vs. Osborne*, *supra*.

"It does not appear that the state law affords a remedy by payment of the assessment and suit to recover it back, which, if it exists, can be availed of in the federal courts, *Singer Sewing Machine Co. vs. Benedict*, 229 U. S., 481, 486, or that such remedy, if available, would not entail a multiplicity of suits. It is not suggested that §626 of the state code, which permits suits to recover taxes and forbids injunctions to restrain their collection, has any application to assessments for drainage. In *Gilseth vs. Risty*,

supra, the Supreme Court of the State evidently did not deem that section applicable, as it did not rely upon it in denying relief. The legal remedy under the state law being uncertain, the federal court has jurisdiction in equity to enjoin the assessment. *Dawson vs. Kentucky Distilleries Co.*, 255 U. S., 288."

[fol. 161]

111

In *Hill vs. Wallace*, 259 U. S., 44, the suit was against the Secretary of Agriculture and others to enjoin the enforcement of an Act of Congress imposing a tax of 20 cents a bushel on certain contracts for the sale of grain for future delivery. It thus is exactly analogous to these causes. There the tax was imposed by Congress, and U. S. Rev. Stat., §3224, was applicable, whereas here this Court has held that §3224 is not applicable to Porto Rico. Consequently, the right to maintain a suit for an injunction is much stronger in these causes than it was in *Hill vs. Wallace*. Nevertheless, equitable jurisdiction was sustained in *Hill vs. Wallace*, and in so holding the Supreme Court said (p. 62):

"A further question arises as to whether this is a suit for an injunction against the collection of the tax in violation of §3224, Rev. Stats., in so far as it seeks relief against the District Attorney and Collector of Internal Revenue. Were this a state act, injunction would certainly issue against such officers under the decisions in *Ex parte Young*, 209 U. S., 123; *Ohio Tax Cases*, 232 U. S., 576, 587; *McFarland vs. American Sugar Refining Co.*, 241 U. S., 79, 82. Does §3224, Rev. Stats., prevent the application of similar principles to a federal taxing act? It has been held by this court, in *Dodge vs. Brady*, 240 U. S., 122, 126, that §3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also *Dodge vs. Osborn*, 240 U. S., 118, 122. In the case before us, a sale of grain for future delivery without paying the tax will subject one to heavy [fol. 162] criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary

business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market in order to test the validity of the act would stop its 1,600 members in a branch of their business most important to themselves and to the country. We think these exceptional and extraordinary circumstances with respect to the operation of this act make §3224 inapplicable."

With that quotation before it, we cannot believe that this Court will fail to see that its decision here does not comply with what was there said by the Supreme Court. In the cases here before the court a sale of almost any article of merchandise without paying the tax will subject the seller to "heavy criminal penalties" besides monetary penalties and seizure of his property. Here, as there, the tax is on "each of many daily transactions" and to pay the tax and then sue to recover it back "would necessitate a multiplicity of suits, and, indeed, would be impracticable."

In *Union Pacific R. R. Co. vs. Weld County*, 247 U. S., 282, the suit was to enjoin the collection of certain property taxes levied for a single year. The lower courts held that there was an adequate remedy at law, but the Supreme Court granted a certiorari and reversed their decision. We quote from the head note:

"Equity has jurisdiction to enjoin the collection of illegally discriminatory taxes where the existence of an adequate and complete remedy at law is doubtful. [fol. 163] "Where the legal remedy by paying the taxes and suing to recover back necessitates separate actions against several school districts and towns, it will not displace the equitable remedy by injunction in one suit."

In *Ohio Tax Cases*, 232 U. S., 576, 587, the court said:

"The right to invoke the equity jurisdiction is clear; for the Act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of these actions ( § 117 of Act; 35600, Gen. Code); and the bills alleged threatened irreparable injury through the enforcement of the penalties and coercive features of the Act. *Shelton vs. Platt*, 139 U. S., 591, 598; *Ex parte Young*, 209 U. S., 123."

In the cases at bar this court has completely overlooked "the penalties and coercive features" of the statute here involved.

In *Benedicto vs. West Indian & Panama Telegraph Co.*, 256 Fed., 417, 421, this court said:

"The appellants contend that the plaintiffs below had a full, adequate, and complete remedy at law, that the people of Porto Rico was an indispensable party, and that the District Court was therefore without jurisdiction. These contentions cannot be sustained. The acts and threatened acts of interference with the plaintiff's rights and business were, and are, as we have held, without warrant, and on that ground, as well as to avoid a multiplicity of suits, there is plainly jurisdiction in equity. *Ex parte Young*, 209 U. S., 123, 159, 28 Sup. Ct., 441, 52 L. Ed., 714, 13 L. R. A. (N. S.), 932, 14 Ann. Cas., 764; *Philadelphia Co. vs. Stimson*, 223 U. S., 605, 32 Sup. Ct., 340, 56 L. Ed., 570, and cases cited."

[fol. 164] There certainly will be at least an equal multiplicity of suits if the appellants here be remitted to the remedy of paying the taxes and suing to recover them back, for here the taxes are payable day by day and in many cases upon many transactions during one day. Indeed, the multiplicity of suits would be so great and so expensive as almost to force at least many of the appellants to abandon their legal rights. If they do not abandon them, then this court, instead of having forty of such cases upon its docket, will have approximately forty hundred.

In *Benedicto vs. Porto Rican American Tobacco Co.*, 256 Fed. 422, this court sustained a suit in equity to enjoin enforcement of a revenue act which provided for the affixing of stamps to packages containing cigars. The analogy between that case and the cases at bar, upon this point, is complete; for here the tax is paid by means of stamps and a failure to pay subjects the property to seizure. The decision which has been rendered here is thus irreconcilable with the decision there.

None of the cases to which we have here called attention is cited in the opinion of the court in these causes.

#### IV

The principle laid down in *Boise Artesian Water Co. vs. Boise City*, 213 U. S. 276, is one which we do not question

in the least, viz., that the illegality or unconstitutionality of the tax is not of itself a ground for equitable relief. We submit, however, that the court has erroneously applied that principle here. In that case the only remedy which Boise City had for the collection of the license fee there involved was an action at law for its recovery (see p. 286), [fol. 165] and thus there was ample opportunity for the plaintiff in that case to set up the defense of unconstitutionality in that action at law. The plaintiff there was not required to pay the tax first. It was not in danger of being subjected to any penalties, either monetary or criminal. Its property was not subject to seizure for failure to pay the tax, and there was no likelihood of a multiplicity of suits. All the elements which were absent there are present here, and that case in no way sustains the conclusion at which the court here has arrived.

In *Dodge vs. Osborn*, 240 U. S. 118, another case cited by the court in its opinion in these causes, the court was dealing with U. S. Rev. Stat., §2224, which, as above stated, this court has held is not applicable to Porto Rico. It is worthy of note, also, that, in referring to that case in its opinion in these causes, this court inadvertently overlooked three very important words which appear in the opinion in that case. This court said that it was there alleged that unless collection was enjoined "many suits would be brought" (see p. 7 of opinion). What the Supreme Court actually said was that "many suits by other persons will be brought." There is a broad and vital distinction between "many suits" and "many suits by other persons." The fact that forty different people bring separate suits does not constitute a "multiplicity of suits" in the sense in which that term is used in speaking of equitable jurisdiction. But if one person has to bring forty suits then there is a multiplicity of suits which it is one of the pre-eminent functions of equity to avoid. In other words, in *Dodge vs. Osborn* no multiplicity of suits was threatened, whereas [fol. 166] here that of itself is a sufficient reason for resorting to equity.

The aim of equity is to be just, and there is no justice in compelling the appellants to bring a suit every day, or at least every thirty days, in order to present the question of the validity of the statute.

In *Long vs. Norman*, 289 Fed. 5, another case cited in the court's opinion in these causes, the Massachusetts statute which was there held to constitute an adequate remedy at law expressly provided that a suit to recover back taxes might be brought in a federal court (see amended Section 48 as quoted at the bottom of page 8 of 289 Fed.). That case is thus essentially different from the cases at bar, and we earnestly urge that this court clearly erred in following *Long vs. Norman* instead of the *Camunas* case.

## V

In *Proctor & Gamble Distributing Co. vs. Sherman*, 2 Fed. 2nd., 165, Judge Learned Hand, in sustaining a bill in equity to enjoin the collection of taxes, said (p. 166):

"But, quite independently of such doubts, the relief is inadequate because of the express refusal to allow interest. It is no answer to say that interest is not allowed against the sovereign. *U. S. vs. North Carolina*, 136 U. S., 211, 216; 10 S. Ct. 920, 34 L. Ed. 336; *District of Columbia vs. Johnson*, 165 U. S., 330, 338, 17 S. Ct., 362, 41 L. Ed., 734. The adequacy of the requisite legal remedy cannot be measured by the remedies one has against a person who is exempt from all process. If that were the test, the principal itself might be confiscated. While I have been referred to no decision on the point, it seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong."

The Porto Rican Act of June 23, 1924, does not provide for interest, and hence does not afford an adequate remedy.

It is true that by an amendment adopted in 1925 (not referred to in this court's opinion but quoted in the opinion of the District Court at pp. 52, 53 of Record in Nos. 1944-

1949), interest is now provided for; but as to such of these cases as were brought before the Act of 1925 was enacted this objection applies.

## VI

The District Court passed upon the merits and its decrees expressly adjudge that the taxes complained of are "valid and legal in every respect." By the judgments which this court has entered the decrees of the District Court are affirmed. Nothing is said in the judgments of this court about dismissing the suits for want of equitable jurisdiction without prejudice to the bringing of actions at law. Consequently, if these judgments of this court be not vacated, the legal effect will be that the decrees of the District Court, as so affirmed by this court, may be set up as a bar to any action at law the appellants may bring.

To conform to the opinion of this court, its judgments should be that the decrees are reversed and the causes remanded with instructions to dismiss the bills for want of equitable jurisdiction without prejudice to the right of the appellants to bring actions at law.

But even if the judgments of this court were so modified, there still would be great danger that the appellants would be very greatly prejudiced by the action which the District Court and this court have taken. For this reason:

As a condition of staying the decrees during the pendency of the appeals, the District Court and this court both required the appellants to pay the taxes into the registry of the court. The amount paid pursuant to that requirement is now very large—several hundred thousand dollars at least. Most of it, of course, was paid more than thirty days ago, and the statute which this court says is an adequate remedy requires that the taxpayer shall pay under protest, obtain a receipt setting forth the protest, and then sue the Treasurer "within a term of not to exceed thirty days from and after the date of payment."

The vast sum which the appellants have deposited under the orders of this and the District Court will not be paid by the taxpayers. It will be paid by the Clerk of the court. And there is at least grave danger that the collector to

whom the money is paid will take the position that the appellants have not brought themselves within the literal terms of the statute and refuse to give the required receipt with the necessary endorsement showing the protest. Or, [fol. 169] it may be contended that payment was made when the money was deposited, and an action to recover it may fail because not brought within thirty days. There is danger, too, that the insular courts may sustain one or the other of those positions. We do not say that such position would be sound. We do say it might be taken and sustained.

Thus, it is impossible for this court to assure the appellants that a dismissal of these suits would be actually without prejudice to an action at law. And the appellants and others similarly situated are faced with the possibility of losing amounts totaling over a million dollars because they relied upon a unanimous decision of this court (*Camunas* case, *supra*) made upon much consideration and directly deciding in their favor the precise point now adjudged against them.

We feel sure that the court will not deem it improper for us to remind it, in this connection, that when counsel were discussing the subject of adequate remedy at law upon the oral argument of these causes they were virtually stopped by a remark from the bench which, as counsel understood it, was a statement that the court was convinced that resort to equity was proper in these causes, and in consequence of that statement no further argument upon that subject was presented. That consideration, we submit, should incline the court to permit a further hearing—especially as the question will be again presented any way in several other causes next January.

[fol. 170] We beg to add, too, that in the event that this court adheres to the decision it has announced our instructions are to apply for a writ of certiorari; and in order that the time for such application will not be running against the appellants while this application is being considered we respectfully suggest that the judgments entered herein on September 25, 1926, should be vacated and set aside now.

Wherefore, it is respectfully prayed that the judgments herein be vacated and that a rehearing of these causes be granted.

Respectfully submitted,

Francis G. Caffey, Counsel for Appellants in Nos. 1904-1943. Carroll G. Walter, Counsel for Appellants in Nos. 1944-1973. Nelson Gammans, Counsel for Appellants in Nos. 1974-1978.

We hereby certify that in our opinion the foregoing petition is well founded and that it is not presented for the purpose of delay.

Francis G. Caffey, Carroll G. Walter, Nelson Gammans.

October 14, 1926.

[fol. 171] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

[Titles omitted]

[fol. 172] OPINION ON PETITION FOR REHEARING—January 7, 1927

PER CURIAM:

In these Porto Rican tax cases, attacking the validity of taxes levied under the Acts of July 28, 1923 and of August 20, 1925, this court, in its opinion of September 25, 1926, held against the appellants' claim of equity jurisdiction. Their petition of October 14, 1926, for rehearing was allowed. The cases have been reargued exhaustively and with very great ability and learning on both sides. On full consideration, the conclusions of this court are:

I. As the attorney general of Porto Rico concedes the correctness of the decisions of this court in *Camunus v. Porto Rico*, 272 Fed. 924, and *West India Oil Co. v. Gallardo*, 6 Fed. (2d) 523, the question of jurisdiction in equity turns entirely upon the construction to be given to the Porto Rican legislation of 1924, Act No. 9, and 1925, Act No. 84. This court does not now decide that under that legislation actions at law to recover taxes paid under protest

[fol. 173] may not be maintained in the Federal court. But whether, as against objection, such jurisdiction can be sustained, is not entirely plain. The legislature of Porto Rico might well make it plain, as did the legislature of Massachusetts, by a simple statute quoted in *Long v. Norman*, 289 Fed. 5, 8. Apart from this doubt (*Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288, 296), the remedy at law is inadequate. For the taxes in question must be paid monthly, and the protesting tax payer must within thirty days after each payment bring his suit at law against the Treasurer. This involves multiplicity of suits by the same party to enforce the same right, and falls outside the rule laid down in *Dodge v. Osborn*, 240 U. S. 118, 121. Jurisdiction in equity must be sustained. *Risty v. Chic. R. I. & Pac. R. R.*, 270 U. S. 378; *Green v. Louisville, etc., R. R. Co.*, 244 U. S. 499, 507; *Chic., etc., R. R. Co. v. Osborne*, 265 U. S. 14, 16.

II. On the merits: the taxes on sales of goods taken into Porto Rico from the United States must be held valid under *Sonneborn v. Cureton*, 262 U. S. 506, and *West India Oil Co. v. Gallardo*, *supra*. While commerce between the United States and Porto Rico is not, technically, interstate commerce, the right of Porto Rico to tax the sales of goods arriving therein from the United States is not less than the right of a State to tax the sales of goods arriving therein in interstate commerce. *Brown v. Maryland*, 12 Wheat. 419, is not applicable to importations (so called) from the United States.

III. *Brown v. Maryland* is applicable to importations from foreign countries sold by the importers in the original packages, and the taxes as to such importations so sold must be enjoined. But the invalidity of such taxes does not affect other taxes. Compare § 108 of the Act. Sales of such goods, not by the importers in the original packages, are taxable. *Waring v. The Mayor*, 8 Wall. 110. The right of Porto Rico to tax the sales of foreign importations is not greater than the corresponding right of a State.

IV. The appellants' minor contentions as to lack of uniformity and of due process are admittedly inconsistent with the decision of this court in *West India Oil Co. v. Gallardo*, *supra*. We regard the decision in that case as sound in

(fol. 174) principle and as fully supported by such cases as *Stebbins v. Riley*, 268 U. S. 137, 141, 142; *Billings v. United States*, 232 U. S. 261, 280, 281; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 151, 152; *Knowlton v. Moore*, 178 U. S. 41.

V. Pending these appeals, under order of court, the taxes in question have been impounded in the hands of the clerk of the court below. The results are:

(1) In Nos. 1944, 1945, 1946, 1947 and 1949, there must be decrees providing for:

(a) Injunctions against the collection of taxes on sales in the original packages by the importers of foreign goods.

(b) Repayment to the plaintiffs of the impounded proceeds of such taxes.

(c) Payment to the defendant of the proceeds of all other taxes.

(d) If in any of these cases question arises as to the proper division of the impounded funds under (b) and (c), *supra*, such cases are to be remanded to the court below for determination of that question.

(2) In Nos. 1903, 1904, 1908, 1923, 1924, 1940, 1941, 1942, 1943, 1955, 1956, 1957, 1958, 1959, 1960, 1962, 1964, 1965, 1966, 1967, 1968, 1969, 1971, 1972, 1975, 1976, 1977 and 1978, the money impounded is to be paid over to the defendant and the bills dismissed.

(3) In Nos. 1948, 1951, 1952, 1953, 1954, 1961, 1963, 1970, 1973 and 1974 (the balance of the cases), the present records seem inadequate for mandates for final decrees; these cases are therefore remanded to the court below for further proceedings not inconsistent with this opinion.

(4) No costs are to be allowed to either side, in any of those cases, in this court.

The decrees of this court of September 25, 1926, are vacated, and the following decrees will be entered:

In each case enumerated in V. (1) and (3), *supra*, the decree of the District Court is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

In each case enumerated in V. (2), *supra*, the decree of the District Court is affirmed; neither party recovers costs on appeal.

## [fol. 175] IN UNITED STATES CIRCUIT COURT OF APPEALS

On April 27 and 28, 1926, these cases came on to be heard together and were fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

There after, to wit, on September 25, 1926, the Opinion of the Court (page 145) was announced and the following Final Decree was entered in each case:

## FINAL DECREE—September 25, 1926

This cause came on to be heard April 27 and 28, 1926, upon the transcript of record of the District Court of the United States for the District of Porto Rico, and was argued by counsel:

Upon consideration whereof, It is now, to wit, September 25, 1926, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed, with costs in this court to the appellee.

By the Court,

Arthur I. Charron, Clerk.

## IN UNITED STATES CIRCUIT COURT OF APPEALS

Thereafter, to wit, on October 14, 1926, a petition for rehearing (page 153) was filed by the appellants upon which the following Order of Court was entered in each case on November 4, 1926:

## ORDER FOR REARGUMENT—November 4, 1926

The court desires reargument in this case.

By the Court,

Arthur I. Charron, Clerk.

Thereafter, to wit, on November 30 and December 1, 1926, these causes came on to be heard on reargument and were fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

[fol. 176] IN UNITED STATES CIRCUIT COURT OF APPEALS

Thereafter, to wit, on January 7, 1927, an Opinion of the Court (page 171) was filed and the following Order of Court was entered in each case:

ORDER VACATING DECREE—January 7, 1927

The decree of this court of September 25, 1926, is hereby vacated.

By the Court,

Arthur I. Charron, Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 1944

ADOLFO VALDES et al.

v.

GALLABO

No. 1949

FINLAY, WAYMOUTH & LEE

v.

SAME

FINAL DECREE—January 7, 1927

This cause came on to be heard on reargument on November 30 and December 1, 1926, upon the transcript of record of the District Court of the United States for the District of Porto Rico, and was argued by counsel:

Upon consideration whereof, It is now, to wit, January 7, 1927, here ordered, adjudged and decreed as follows: The decree of the District Court is vacated and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court,

Arthur I. Charron, Clerk

## IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 1955

ARABCA et al.

v.

GALLARDO

FINAL DECREE—January 7, 1927

This cause came on to be heard on reargument on November 30 and December 1, 1926, upon the transcript of record of the District Court of the United States for the District of Porto Rico, and was argued by counsel:

Upon consideration whereof, It is now, to wit, January 7, 1927, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed; neither party recovers costs on appeal.

By the Court.

Arthur I. Charron, Clerk.

[fol. 177] IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY—Filed January 28, 1927

Come now the appellants in the above entitled cause and represent that they intend to file in the Supreme Court of the United States a petition for a writ of certiorari to review the decision of this court in the above entitled cause.

Wherefore they respectfully pray that the issue of mandate upon the decree entered herein on January 7, 1927, be stayed pending the determination by the Supreme Court of such petition for writ of certiorari and until the further order of this court herein.

Dated January 25, 1927.

Carroll G. Walter, Counsel for Appellants.

No objections. William Catron Rigby, Counsel for Appellee.

## IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—JANUARY 28, 1927

It is ordered that mandate herein be, and the same hereby is, stayed until further order of court.

By the Court.

Arthur I. Charron, Clerk.

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[fol. 178] Clerk's certificate to foregoing transcript omitted in printing.

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Endorsed on cover: File Nos. —. U. S. Circuit Court of Appeals, First Circuit. Term No. —. Adolfo Valdes, Pio Perez, Luis C. Cuyar, et al., etc., petitioners, vs. Juan G. Gallardo, Treasurer of Porto Rico. Term No. —. Finlay, Waymouth & Lee, Inc., petitioner, vs. Juan G. Gallardo, Treasurer of Porto Rico. Term No. —. Angel Abarea Portilla, Rafael Abarea Portilla, Enrique Abarea Sanfeliz, et al., etc., petitioners, vs. Juan G. Gallardo, Treasurer of Porto Rico. Filed ———, 1927. File Nos. —.

## SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 16, 1927

The petition herein for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted and the cases are set for hearing on the first day of next term, Monday, October 3 next, after the cases heretofore assigned for that day, on the sole question whether they have become moot by virtue of the act of March 4, 1927, amending section 48 of the organic act of Porto Rico.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

  
(6633)



FILED  
APR 4 1927

WM. B. STANBURY  
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1926

No. [REDACTED]

211

T. H. SMALLWOOD, W. F. SMALLWOOD, A. D.  
SMALLWOOD, et al., etc.,

Petitioners.

—vs.—

JUAN G. GALLARDO, Treasurer of Porto Rico.

No. [REDACTED]

212

ADOLFO VALDES ORDONEZ, SALVADOR GARCIA,  
VICTOR OCHOA, et al., etc.,

Petitioners.

—vs.—

JUAN G. GALLARDO, Treasurer of Porto Rico.

No. [REDACTED]

213

INSULAR MOTOR CORPORATION,

Petitioner,

—vs.—

JUAN G. GALLARDO, Treasurer of Porto Rico.

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## PETITION FOR WRITS OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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FRANCIS G. CAFFEY,  
Solicitor for Petitioners,  
165 Broadway,  
New York City.



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# Supreme Court of the United States

October Term, 1926.

T. H. SMALLWOOD, W. F. SMALL-  
WOOD, A. D. SMALLWOOD, *et*  
*al.*, etc.,  
Petitioners, No.

—VS.—

JUAN G. GALLARDO, Treasurer of  
Porto Rico.

ADOLFO VALDES ORDONEZ, SAL-  
VADOR GARCIA, VICTOR OCHOA,  
*et al.*, etc.,  
Petitioners, No.

—VS.—

JUAN G. GALLARDO, Treasurer of  
Porto Rico.

INSULAR MOTOR CORPORATION,  
Petitioner, No.

—VS.—

JUAN G. GALLARDO, Treasurer of  
Porto Rico.

*Petition for Writs of Certiorari to the United  
States Circuit Court of Appeals for the  
First Circuit.*

TO THE HONORABLE THE SUPREME COURT OF THE  
UNITED STATES:

The petitioners, who are the complainants in the  
above entitled causes, respectfully show as follows:

I. These cases involve an important Federal  
question which has been decided below in a way

probably in conflict with the applicable decisions of this Court.

2. There are three reasons why the matter is important:

(a) The issue is whether legislation of Porto Rico violates an act of Congress prescribing freedom from duty of merchandise going into Porto Rico from continental United States.

(b) The determination of that issue here would govern numerous other cases. Some already considered below, wherein certiorari is not asked, are held there upon orders staying mandates and extending the time for seeking rehearings pending the outcome of the present application; some not yet decided are held to await this result.

(c) Porto Rico between 1919 and 1925 enacted a series of statutes designed to raise a large share of its revenue from the taxation of merchandise going there from continental United States. The one passed in 1919, as amended in 1921, was held by its own Supreme Court to infringe the law of the United States establishing free trade in such merchandise. Several attempts have been made to overcome or evade the obstacle. The statutes now criticised are instances of efforts of this type. It is of grave concern to the government of Porto Rico, as well as to all its taxpayers, to have a specific ruling on the subject from the Court of last resort.

3. Petitioners import automobiles into Porto Rico. These go exclusively direct by steamer from

continental United States. On arrival the ocean carrier delivers them in original packages to petitioners, who are also dealers and regularly engaged in selling them in Porto Rico.

4. In 1923 the legislature of Porto Rico laid an *ad valorem* tax of 10% and in 1925 of 7% on automobiles. In the words immediately defining the incidence of the tax the articles subjected to it are described in the 1923 statute as those "produced, manufactured, sold or used in Porto Rico" and in the 1925 statute as those "sold, transferred, used or consumed in Porto Rico." Each statute, however, also contains substantive clauses, the result of which is that, by the terms of both statutes, no automobile (with a few exceptions which do not affect these cases) is permitted to enter Porto Rico from the United States without the importer incurring liability for the tax thereon the instant he acquires possession of it from the carrier who has transported it to Porto Rico.

5. The Organic Act of Porto Rico provides that merchandise shall go into Porto Rico from the United States free of duty and that in no event shall duties be collected thereon.

6. Petitioners brought bills in the United States District Court for Porto Rico to enjoin the respondent from collecting from them this *ad valorem* tax on automobiles they imported from the United States and from seizing their property for nonpayment of the tax. They alleged that the statutes imposing the tax contravene the free trade clause of the Organic Act. The District Court denied relief. Its final decrees were affirmed by the Circuit Court of Appeals for the First Circuit.

7. The court below based its action wholly upon the view that the automobiles concerned, while still in the hands of the importers and in the original packages in which carried from continental United States to Porto Rico, were immediately taxable when they came to rest in Porto Rico in the same way that original packages transported in interstate commerce are taxable by the State of arrival as soon as they come to rest there. In its opinion (R. 151), reported under the title of *Porto Rico Tax Appeals*, 16 Fed. (2d) 545, 549, it was said:

"The taxes on sales of goods taken into Porto Rico from the United States must be held valid under *Sonneborn vs. Cureton*, 262 U. S. 506, and *West India Oil Co. vs. Gallardo*, supra. While commerce between the United States and Porto Rico is not, technically, interstate commerce, the right of Porto Rico to tax the sales of goods arriving therein from the United States is not less than the right of a state to tax the sales of goods arriving therein in interstate commerce. *Brown vs. Maryland*, 12 Wheat. 419, is not applicable to importations (so called) from the United States."

8. In so holding the lower court went contrary to *Reven vs. Maryland* and misapplied *Sonneborn Reven vs. Cureton*.

(a) The denial by the Constitution to a State of power to tax an import from a foreign country is essentially identical with the prohibition by Congress against Porto Rico laying duties on goods going there from continental United States. While the subjects

to which applicable differ; while the source of the limitation on a State is the Constitution and of the limitation on Porto Rico is a statute, the process that is exempted is the same. In consequence the steps or elements comprehended in the process are the same. *Brown vs. Maryland* held that the constitutional immunity of an import from taxation by a State extends to a sale or opportunity for sale by the importer in the place to which imported of the merchandise in the original package in which the same was contained during transportation to the port of entry. This immunity necessarily includes the stage of delivery to the importer by the importing carrier. Yet, by the statutes sustained below, liability for the tax which Porto Rico imposes on automobiles becomes fixed upon the importer, and is measured by the import value, at the moment the articles imported reach him notwithstanding they are then in the same form and condition in which brought into the island.

(b) In *Sonneborn Bros. vs. Cureton* it was determined that when merchandise carried through interstate commerce comes to rest within a State it is taxable by that State in the original package. The court below construed that case as establishing the time when exemption of an importation from taxation comes to an end. Yet the sole question in the *Sonneborn* case was whether the State tax dealt with regulated or burdened commerce between the States, and this Court there expressly said that where immunity from taxation of imports exists it continues throughout the period during which the imported article

is in its original package and until the importer sells or has opportunity to sell it in that form.

9. There is presented herewith as part of this petition a certified transcript of the records of the above entitled causes in the Circuit Court of Appeals.

WHEREFORE, petitioners pray that writs of certiorari severally be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding that court to certify and send to this Court, on a day certain to be therein designated, full and complete transcripts of the records and all proceedings in said Circuit Court of Appeals in these causes, to the end that said causes may be reviewed and determined by this Court as provided by law, and that the decrees of said Circuit Court of Appeals in these causes may be reversed by this Court, and that petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate.

And petitioners will ever pray.

FRANCIS G. CAFFEY,  
Solicitor for Petitioners.

STATE OF NEW YORK, }  
 COUNTY OF NEW YORK, } ss.:

FRANCIS G. CAFFEY, being duly sworn, says:

I am solicitor for the petitioners herein. I have read the foregoing petition and know its contents. The same is true to the best of my knowledge, information and belief.

FRANCIS G. CAFFEY.

Sworn to before me this  
 23rd day of March, 1927.

DAVID D. VINCENT,

Notary Public, N. Y. Co. 33, Reg. 7001,

Cert. filed Kings Co. 1, Reg. 7000,

Commission expires March 30, 1927.

(Seal)

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to favorable consideration of the Court, and that it is not filed for the purpose of delay.

FRANCIS G. CAFFEY,  
 Counsel.

**BRIEF.**

For convenience extracts from the Porto Rico tax statutes of 1923 and 1925 and from the Organic Act of Porto Rico are set out in annexed appendices. An additional appendix contains translation of extract from an opinion by the Supreme Court of Porto Rico which is reported only in Spanish.

This petition and another to be submitted at the same time cover six cases. These were selected by counsel as sufficient to test and be determinative of the issues in forty-three cases decided together below (R. 129-131) and in numerous other cases pending there undecided.

*Jurisdiction.*

(1) Review by this Court is sought pursuant to section 240 (a) of the Judicial Code. This is done within the three months period prescribed by section 8 (a) of the Act of February 13, 1925 (43 Stat. at L. 940, c. 229), after entry in each case on January 7, 1927, by the Circuit Court of Appeals of the decree of affirmance (R. 154).

(2) The District Court had jurisdiction under section 24 (1) of the Judicial Code, made applicable by section 41 of the Jones Act (39 Stat. at L. 965, c. 145), because (a) the cases arise under a law of the United States (R. 10, par. 7; 123, par. 9, subdiv. 2; 67, par. 7; 68-9, par. 9, subdiv. 2; 81, par. 6; 82, par. 8, subdiv. 2); (b) the matter in controversy in each case exceeds, exclusive of interest and costs, the sum or value of \$3,000 (R. 3, par. 2; 30, 33, 36; 60, par. 2; 77, par. 2; 113, 120); (c) there was no adequate remedy at law and suit in equity lies for an injunction (R. 10,

par. 6; 12, par. 9, subdiv. 4; 67, par. 6; 69, par. 9, subdiv. 4; 80-1, 82-3, 138-148, 150-1).

(3) The decrees of the District Court were final (R. 57-9, 71-3, 107-8) and the United States Circuit Court of Appeals for the First Circuit was authorized to entertain appeals therefrom (Judicial Code, secs. 116, 128).

### STATEMENT.

As will appear later, petitioners maintain that the criticised statutes are invalid on their face. For the disposition of that contention perhaps no addition is needed to what has been said in the petition about the facts. Nevertheless, it is pertinent to call attention to several things:

(a) No automobiles are produced or manufactured in Porto Rico. Petitioners deal in those articles. All they handle are imported by themselves directly from continental United States into Porto Rico, where they are regularly engaged in selling them in the same condition in which they leave the United States and arrive in Porto Rico, without any process of further manufacture or improvement. These transactions in automobiles constitute all or the principal part of their business. The continuance of the business depends on their ability successfully to import and sell the automobiles.

(b) In the *Smallwood* and *Ordóñez* cases the tax in controversy is that prescribed on automobiles by the 1923 statute and in the *Iusular Motor* case that prescribed by the 1925 statute.

(c) The bills are in the usual form to enjoin the collection of taxes. Among other things, each alleges the foregoing facts (R. 2-13, 59-70, 76-84).

In the *Smallwood* and *Insular Motor* cases answers were filed (R. 22-7, 84-7) and in the *Ordóñez* case a motion made to dismiss the bill because of failure to state a cause of action (R. 71). In the *Smallwood* and *Insular Motor* cases evidence was taken (R. 29-52, 111-120), which establishes without dispute the averments relied on in this petition.

(d) The position of respondent is made clear by the answers in the *Smallwood* and *Insular Motor* cases. He there asserts that the tax assailed is not on importations, but is on sales of imported articles after they have acquired a situs in Porto Rico and have become a part of the mass of property of the sellers therein (R. 25, par. 7; 26, par. 9 c; 26-7, special defense; 86, special defense).

(e) In the *Smallwood* and *Insular Motor* cases the testimony shows that the cars subjected to taxation were transported to Porto Rico packed in boxes (R. 29, 115) and that after landing they remained in those boxes in the hands of the carriers until removal by the importers from the docks (R. 29, 30, 115-6).

(f) In the *Ordóñez* case the motion to dismiss (R. 71) concedes the allegation of paragraph 2 of the bill that the automobiles are sold by the importers "to the public at large in exactly the same conditions in which they are brought into Porto Rico" (R. 60).

(g) Actual assessments are predicated upon manifests and other writings produced by the importer for examination by respondent's agents (R. 40-1, 112, 119) and, at least in some instances, are made not merely before delivery of the merchandise by the carrier to the importer and before the packages in which it was transported to Porto

Rico are broken and before any sale by the importer has occurred, but even preceding arrival of the goods in Porto Rico (R. 41, 113).

(b) The method by which respondent fixes the amount for which he assesses the tax is illustrated by documents in the *Insular Motor* case (R. 124-8). The base he uses is composed of the purchase price in the United States (R. 127), the inland freight in and the cost of boxing for shipment from the United States (p. 128), the transportation expenses from the United States to Porto Rico (R. 126) and 10% of the total of those items (R. 125). Upon this base the tax is calculated at the rate prescribed by the statute (R. 125). The oral testimony in the *Smallwood* and *Insular Motor* cases is indisputably to the same effect (R. 44-5, 112, 119-6).

(c) In all the cases the prayer, among other things, is for an injunction against the collection of the tax on the articles involved, whether in the original packages in which brought from the United States or after delivery by the carrier in the original packages or otherwise (R. 12, 69, 83).

#### *Preliminary Points.*

(1) As no motor vehicles are produced or manufactured in Porto Rico, any tax on them applies only to such as are imported.

(2) The *ad valorem* tax on automobiles originated in Act No. 55 of July 15, 1919 (Laws of 1919, p. 226). The rate was doubled and minor changes were made by Act No. 42 of July 1, 1921 (Laws of 1921, p. 298). In both statutes there were expressly included as subjects of taxation motor vehicles "introduced or brought into Porto

Rico." In *Benítez Sugar Co. vs. Aboy*, 34 P. R. Rep. 36 (Appendix D), it was held that the Act of 1921 imposed duties on goods going into Porto Rico from continental United States in violation of the free trade clause of the Organic Act (Appendix C).

(3) A comparison, by means of parallel columns, of the Act of 1919 or 1921 with the Acts of 1923 and 1925 would reveal an obvious purpose to continue in the latter statutes the taxation of merchandise coming from the United States which the Supreme Court of Porto Rico condemned in the case just cited, the alterations in regard to such merchandise being solely in the form of phrasology and not in substance. At this stage, however, it would be unduly burdensome to go in to the details necessary to demonstrate the truth of that statement.

(4) The persistent effort by Porto Rico to lay duties on imports from the United States has culminated in a unique confession embodied in the Act of 1925. By section 109 of that statute (Appendix B) a direct duty at the same rate prescribed by section 16, payable "at the time of the importation," is laid on the articles embraced in section 16 (including automobiles) when "imported into Porto Rico from any state, territory or district of the United States," to become effective when Congress approves and, if Congress approves, entirely to supersede the tax imposed by section 16. (See note to Appendix C.)

(5) Taxation exists only by legislative action. It can come into being solely through exercise by the legislature itself of the sovereign's function. In consequence whether a tax is levied must be de-

terminated by examination of a statute (*Meriwether vs. Garrett*, 102 U. S. 475, 515).

(6) The meaning of a statute is to be ascertained from its effect (*Henderson vs. Mayor*, 92 U. S. 259) or "self-evident operation" (*Miller vs. Milwaukee*, 47 Sup. Ct. Rep. 280; 71 L. ed. 346).

(7) Each petitioner is a "dealer" within the definition of that term in section 17 of the Act of 1923 (Appendix A) and section 12 of the Act of 1925 (Appendix B).

#### *Propositions.*

(1) The tax is levied on the automobiles while still in the form and original packages in which they reach Porto Rico.

(2) The tax is on importations from continental United States into Porto Rico and not on sales in Porto Rico after completion of entry there.

(3) The option of a dealer to defer actual payment of the tax until he sells the articles does not affect or relieve of the liability therefor which was incurred contemporaneously with their coming into his possession.

(4) The Organic Act prohibits taxation by Porto Rico of merchandise in the form and original packages in which it arrives there from the United States.

(5) The rule that a State may tax goods transported in interstate commerce as soon as they come to rest within its borders does not apply here.

## ARGUMENT.

### I.

*The tax is levied on the automobiles while still in the form and original packages in which they reach Porto Rico.*

Analysis of the Act of 1923 will make clear that coincidentally with the delivery to the Porto Rican importer of merchandise brought into the island from the United States his liability for the tax thereon accrues. The articles made the subject of the tax, carried into Porto Rico, cannot reach the possession of the importer there without his liability for the tax immediately attaching, irrespective of whether previously there has been or thereafter shall be a sale.

Section 33 (Appendix A) provides in part that the prescribed tax on the articles (including automobiles)

" \* \* \* shall be levied as soon as they are on the market in the possession of a dealer \* \* \* in this island, who shall be responsible for the payment of said taxes upon transferring said articles to another dealer or consumer, or upon acquiring them or having them in his possession."

It will be noted that the tax is levied "as soon as" the articles "are on the market in possession of" the person to whom delivery is made, and that he becomes "responsible for" its payment upon "having them in his possession." True a dealer is responsible, in the alternative, upon "transferring" or "acquiring" the articles; but as he is also liable instantly when he takes possession, it is inescapable that the tax accrues concurrently with

the inception of his possession. This is rendered the more certain by another provision (sec. 7-a) which defines "acquire," as used in the statute, to mean "material possession of the taxable article in Porto Rico *to be* exposed for sale, use or consumption." Inasmuch as petitioners import the articles exclusively for purposes of sale, within the statute such articles are *acquired* as soon as received; i. e., *eo instanti* upon delivery by the ocean carrier which has transported them from the United States. Moreover, as a dealer who himself is an importer cannot conduct his business without taking possession of the imported merchandise, there is no way by which he can avoid the tax on it.

In the same way, though in different language, the Act of 1925 (Appendix B) levies the tax immediately upon the goods reaching the possession of the importer. Section 41 provides that "every taxable article hereunder in possession of" a dealer "shall be affected hereby." This can mean nothing except that the tax liability is absolute the moment the goods get into the possession of the importer.

Obviously if the tax liability becomes fixed upon delivery of an importation by the ocean carrier to the Porto Rican importer, the automobiles when taxed are in the form and original packages in which brought into Porto Rico.

It may be suggested that the employment in section 43 of the 1923 statute of the expression "on the market" delays the accrual of the tax until the importer has removed the import to his own premises and there exposed it for sale. The answers are that (a) this interpretation is inconsistent with other parts of the section and (b), as will be seen later, additional provisions yet to be discussed compel its rejection.

## II.

*The tax is on importations from continental United States into Porto Rico and not on sales in Porto Rico after completion of entry there.*

As previously observed, the words of the Acts of 1919 and 1921 "introduced or brought into Porto Rico," as a portion of the adjective description of the articles subjected to taxation, were omitted from the Acts of 1923 and 1925. The question is whether a substitute of the same significance was incorporated.

Unfortunately the formulation of an adequate answer is tedious. The statutes are lengthy. They must be traced through in order to discover their real meaning.

In the clauses of the later statutes providing rates on motor vehicles the phrases used are in the Act of 1923 (sec. 20, subdiv. 18) "produced, manufactured, sold or used in Porto Rico" and in the Act of 1925 (sec. 16, subdiv. 15) "sold, transferred, used or consumed in Porto Rico." It may be conceded that if the matter turned *solely* on these particular words, it would not necessarily follow that importations are taxed. When, however, resort is had to other clauses, it is manifest that a duty is laid on all importations from continental United States.

That it was the purpose of Porto Rico to deprive the articles of free entry into the island is evident, in part, from the following:

(a) The tax is exacted *once only* (Act of 1923, sec. 20, subdiv. 18; Act of 1925, sec. 16, subdiv. 15). If the object had been to tax sales, then every sale, whenever occurring, would have been put on an equal basis and there would have been no reason to limit to a single time.

(b) The valuation for taxation is 110% of the cost in continental United States, plus freight and other expenses of carriage to and delivery in Porto Rico (Act of 1923, sec. 6; Act of 1925, sec. 4). The moment required for ascertaining value of an article taxed is when it reaches the possession of the importer. If the intent had been to tax sales, then plainly the valuation at which taxed would have been the price at which sold. Yet, the price at which sold is without any significance whatsoever—except only that in event a sale be *later* made for less than the valuation at which taxed, the Treasurer may entertain application for a refund of the deficiency below 10% included under the name of profit in calculating that valuation.

(c) If a dealer does not pay the tax at the time he acquires possession, he must give bond to pay it (Act of 1923, sec. 53; Act of 1925, sec. 23). This requirement completely negatives the concept that it is sales that are taxed. (See III, *infra*.)

(d) Goods on hand at the date of the statute going into effect are exempt from the tax (Act of 1923, sec. 35, proviso b; Act of 1925, sec. 35, proviso at end). This points unerringly to the conclusion that the tax is on the importation and not on the sale. If the design had been to tax sales, then obviously a sale of accumulated stock held by a merchant in Porto Rico when the new law went into force would have been subjected to the tax.

(e) Destroyed merchandise (Act of 1923, sec. 41) is relieved from the tax of 1923. If the tax were on sales, there would have been no occasion for this provision.

Numerous other parts of the statutes, the recital of which now would be burdensome, fortify

our interpretation. When, however, the summary just made is considered in conjunction with the fact that liability for the tax is complete whenever articles embraced in the statutes reach a dealer, it would seem incontrovertible that, so far as concerns automobiles carried from the United States, it is the importations rather than the sales that are taxed.

### III.

*The option of a dealer to defer actual payment of the tax until he sells the articles does not affect or relieve of the liability incurred concurrently with their coming into his possession.*

There is an alternative to postpone payment of the tax until a sale is made (Act of 1923, sec. 33; Act of 1925, secs. 37-40). It will doubtless be urged that this shows that the tax is on the sale. That, however, does not follow. The condition on which delay may be availed of prevents. A dealer who has taken possession without paying at the time he got possession is compelled to give bond in accordance with regulations of the Treasurer (Act of 1923, sec. 33; Act of 1925, sec. 23). In *Henderson vs. Mayor*, 92 U. S. 259, a shipowner conveying persons to New York from a foreign country had the choice of paying \$1.50 for each or furnishing a bond. It was said (p. 274) that the direction "to give the bond or pay the money because he has landed the passenger" was the levy of a head tax. It is equally true that the demand by Porto Rico that a dealer who has taken possession at the dock of merchandise brought from the outside pay a tax or give a bond is the levy of a tax on the import.

## IV.

*The Organic Act prohibits taxation by Porto Rico of merchandise in the form and original packages in which it arrives there from the United States.*

The language of the statute establishing free trade between Porto Rico and the United States, as embodied in the U. S. Code (Appendix C), is in part as follows:

"All merchandise and articles \* \* \* coming into Porto Rico from the United States shall be entered at the several ports of entry free of duty and in no event shall any duties be collected on said merchandise or articles."

The Constitution (Art. 1, sec. 10, clause 2) provides that

"No State shall, without the consent of the Congress, lay any imposts or duties on imports \* \* \*."

The immunity granted by the Constitution from taxation by a State of an import from a foreign country is no less than the immunity granted by the Organic Act from taxation by Porto Rico of merchandise going from continental United States to Porto Rico. The process of goods going into Porto Rico from the United States is identical with the process of goods coming into the United States from a foreign country. It follows that the elements of which entry into Porto Rico of goods from continental United States consists are the same as the elements of which entry of goods into the United States from abroad consists.

It follows also that whatever constituent of that entry has been freed by the Constitution from taxation by a State has likewise been freed by the Organic Act from taxation by Porto Rico so far as concerns articles going there from continental United States.

In *Brown vs. Maryland*, and the long line of decisions of this Court for more than a hundred years reaffirming the doctrine there announced, it is settled that free importation includes freedom from taxation of sales in original packages by the importer after the articles have reached his hands. If a State is prohibited from requiring of an importer a license fee to make sales in original packages of goods brought into a State from a foreign country, then likewise Porto Rico is prohibited from collecting what it denominates an internal revenue or excise tax on a sale in original packages, after importation, of goods imported from continental United States. As the greater includes the less, so also if the articles are exempt until subsequent to sale or opportunity to sell in that form, the importation itself, which of necessity is a preceding step, is exempt. The ruling below to the contrary is in flat opposition to *Brown vs. Maryland*, where it was said (12 Wheat. 439):

"it is plain, that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port."

## V.

*The rule that a State may tax goods transported in interstate commerce as soon as they come to rest within its borders does not apply here.*

In saying that the immunity was at an end when the articles came to rest in Porto Rico (R. 151, par. II; *Porto Rico Tax Appeals*, 16 Fed. (2d) 549) the Court of Appeals was not warranted in relying on, but flew in the face of, *Sonneborn Bros. vs Cureton*. It was there sought to get this Court to take that very position. To the argument in support of it this was the reply (262 U. S. 509-0) :

"The reasoning is based on the supposed analogy of the immunity from state taxation of imports from foreign countries which lasts until the article imported has been sold, or has been taken from its original packages of importation and added to the mass of merchandise of the State. This immunity of imports was established by this Court in *Brown vs. Maryland*. \* \* \*

"The holding was that the sale was part of the importation. It is the article itself to which the immunity attaches and whether it is in transit or at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the State may not tax it. \* \* \*

"Cases subsequent to *Brown vs. Maryland* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from state taxation fails. The distinction is that the immunity attaches to the import itself before sale, while the immunity in case of an

article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce."

The automobiles taxed by Porto Rico were at rest there. The tax accrued at the very time they passed into the hands of the importer. This is the effect and "self-evident operation" of the statutes. The articles were then still "in the form and package in which imported." The privilege granted by the laws of the United States would be illusory if it were not interpreted to embrace the stage of delivery of the articles in original packages by the ocean carrier to the Porto Rican importer. The *Sonneborn* case holds unequivocally that the immunity of an import from taxation continues, by virtue of its import status, long subsequent to its reaching a point of rest by the carrier turning it over to the importer.

*Conclusion.*

It is respectfully submitted that the writs should be granted, the causes reviewed and the decrees of the Court of Appeals reversed as prayed in the petition.

Dated, March 23, 1927.

FRANCIS G. CAFFEY,  
Solicitor for Petitioners.

## APPENDIX A

*Extracts from Porto Rican tax statute of 1923.*

(Act No. 68 of July 28, 1923, Laws of 1923, p. 442; as amended by Act No. 1 of August 27, 1923, Laws of 1923, Special Session, p. 2, and Act No. 6 of June 23, 1924, Laws of 1924, Special Session, p. 50.)

**Section 6.—Definition of the phrase *ad valorem*.**—For the purposes of this Act the phrase *ad valorem* shall be construed to mean the cost of an article after it is in the possession of a person, plus a reasonable benefit to be estimated at ten per cent over the amount of said cost, unless such person proves, to the satisfaction of the Treasurer of Porto Rico, that the profit obtained on said article is less than said ten per cent; \* \* \* (as amended by section 1 of Act No. 1 of August 27, 1923).

**Section 7 a.—Definition of the word "acquire."**—Whenever in this Act the word "acquire" is used in any of its grammatical forms, it shall mean the material possession of the taxable article in Porto Rico to be exposed for sale, use or consumption (as amended by section 2 of Act No. 6 of June 23, 1924). \* \* \*

**Section 17.—Dealers.**—That every person who himself or through his agents or employees, sells or offers or exposes for sale, or keeps on his business premises or on any premises contiguous thereto or connected therewith, whether used as a dwelling or otherwise, any article subject to taxation hereunder, for the purpose of selling the same, shall be regarded as a dealer. \* \* \*

**Section 20.**—That there shall be levied, collected and paid, for one time only, as an internal-revenue tax on each of the following articles: \* \* \*

18. *Motor vehicles.*— On every motor vehicle, automobile, \* \* \* produced, manufactured, sold or used in Porto Rico, a tax of ten (10) per cent *ad valorem*, \* \* \*

Section 29.—That the tax shall attach to such merchandise taxable hereunder as may be manufactured or produced in Porto Rico, as soon as the same shall have been manufactured or produced, but payment shall be made before such merchandise is removed from the factory, except as herein otherwise provided, and in such form as the Treasurer of Porto Rico may by regulation prescribe, \* \* \*

Section 33.—The tax hereby prescribed on articles for sale, use, consumption or exhibition in Porto Rico, except as provided in section 29 of this Act, shall be levied as soon as they are on the market in possession of a dealer or commission merchant or the representative thereof in this island, who shall be responsible for the payment of said taxes upon transferring said articles to another dealer or consumer, or *upon acquiring them or having them in his possession*, and who shall pay such taxes *in one of the two following forms in accordance with such regulations as the Treasurer of Porto Rico may prescribe for the purpose*: (a) Upon acquiring the taxable articles and having them in his possession, by making entries of receipt and delivery in the stock and receipt and delivery book, and by simultaneously paying the tax by cancelling the corresponding stamps on an internal revenue invoice; or (b) as he disposes of the taxable articles. Persons acquiring taxable articles through channels other than the aforesaid dealers or commission merchants or their representatives, shall pay said taxes as soon as they obtain possession of the

articles and in accordance with the definition of *ad valorem* contained in this Act. \* \* \* (as amended by section 5 of Act No. 1 of August 27, 1923).

Section 35.— \* \* \* From and after the date on which this Act take effect, every person, who by himself or through his agents or representatives, acquires taxable articles for sale or transfer to another merchant or consumer, and on which the taxes specified by this Act have not been paid, shall keep in his commercial establishment, from which it shall not be removed, except by authorization of the Treasurer of Porto Rico, an official book wherein entries shall be made of all taxable articles at the time they are acquired, \* \* \* *Provided*, That upon the taking effect of this Act, the stock on the market shall be classified as follows: \* \* \*

(b) That subject to the payment of taxes on which such taxes have not been paid; \* \* \* *Provided, further*, That merchandise already acquired under classes (a), (b) and (c), shall not be taxable under this Act; \* \* \*

Section 41.— That the Treasurer of Porto Rico is hereby authorized to remit the tax accruing on any merchandise under the Internal-Revenue Laws of Porto Rico, upon presentation to him of satisfactory evidence of its actual destruction by fire or by *force majeure* \* \* \* Whenever the person liable for the payment of the internal-revenue tax on such destroyed or damaged merchandise is indemnified against the loss of said tax by a valid insurance claim, said tax shall not be remitted. \* \* \*

Section 53.— \* \* \* Every dealer having taxable articles in his possession upon which taxes have not been paid, shall provide a bond for the amount that the Treasurer of Porto Rico may require \* \* \*.

## APPENDIX B.

*Extracts from Porto Rican tax statute of 1925.*

(Act No. 85 of August 20, 1925, Laws of 1925, p. 584.)

Section 4.—*Definition of the Phrase "Ad Valorem."*—For the purposes of this Act, the phrase "*ad valorem*" shall be construed to mean the cost of the article when in possession of the person, plus a reasonable profit to be estimated at ten (10) per cent of said cost, if such person fails to prove, to the satisfaction of the Treasurer of Porto Rico, that the profit obtained on such articles is less than the aforesaid percentage; \* \* \*

Section 12.—Every person who himself, or through his representatives, agents or employees, sells, offers or exposes for sale on his business premises or on any premises separate therefrom or connected therewith, whether used as a dwelling or for another purpose, any article subject to taxation hereunder, for the purpose of selling the same, shall be regarded as a dealer. \* \* \*

Section 16.—There shall be collected and paid, once only, an internal revenue tax on each of the following articles: \* \* \*

15. *Motor Vehicles*.—On every motor vehicle such as automobiles, \* \* \* sold, transferred, used or consumed in Porto Rico, a tax of seven (7) per cent *ad valorem*. \* \* \*

Section 23. \* \* \* Every dealer having taxable articles in his possession upon which taxes have not been paid, shall furnish a bond in favor of The People of Porto Rico in such amount as the Treasurer of Porto Rico may require. \* \* \*

Section 35.—That all excise taxes provided for in this Act shall be paid by affixing and canceling internal-revenue stamps on such documents and articles, as for such purpose the Treasurer of Porto Rico may prescribe. \* \* \* *Provided, further,* That the Treasurer of Porto Rico may affix such stamps on taxable articles acquired while former excise tax laws were in force and which articles are on the market when this Act takes effect. \* \* \*

Section 37.—Dealers shall be liable for the payment of the tax upon selling or transferring the taxable article to another dealer or to a consumer.

Section 38.—The consumer shall be liable for the payment of the tax upon coming into possession of the taxable article for use or consumption in Porto Rico.

Section 39.—Taxes prescribed by this Act on the sale, transfer, use or consumption in Porto Rico of articles comprised in section 16 shall be paid by the dealer upon selling or transferring the taxable articles to another dealer or to a consumer.

Section 40.—A consumer possessing a taxable article on which the tax prescribed by this Act has not been paid, shall pay the said tax as soon as he shall have possession of such article taxable in Porto Rico for use or consumption.

Section 41.—From and after the date on which this Act takes effect, every article taxable hereunder in possession of a manufacturer, dealer or consumer, on which no internal revenue tax shall have been paid for any reason, shall be affected hereby and the taxes herein determined on such taxable articles shall be paid at the time and in the manner prescribed by this Act. \* \* \*

Section 109.—From and after the date on which the Congress of the United States ratifies this

section, there shall be levied and collected by the Treasurer of Porto Rico on all articles enumerated in section 16 of this Act, imported into Porto Rico from any state, territory or district of the United States or from foreign countries, the same tax established by this Act for the manufacture or use of said articles, or for dealing therein. Said tax shall be paid at the time of the importation of said articles which shall not be delivered to the consignee thereof until the payment of the tax, established in this section shall have been proven. Upon such payment the imported articles shall be exempt from all tax for the use thereof or for dealing therein.

### APPENDIX C.

#### *Extracts from Organic Act of Porto Rico.*

##### (1) *Foraker Act.*

(Act of April 12, 1900, c. 191, 31 Stat. at L. 77.)

Sec. 3. \* \* \*; and whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation to meet the necessities of the government of Porto Rico, by this Act established, and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, nineteen hundred and two, on merchandise and

articles going into Porto Rico from the United States or coming into the United States from Porto Rico.

(2) *Jones Act.*

(Act of March 2, 1917, c. 145, 39 Stat. at L. 968.)

Sec. 58. That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs, and duties on importations into Porto Rico prescribed by the Act of Congress entitled "An Act temporarily to provide revenues and a civil government for Porto Rico and for other purposes," approved April twelfth, nineteen hundred, are hereby continued in effect, and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.

(3) *United States Code.*

(Title 48, ch. 4, sec. 738.)

738. *Free interchange of merchandise with United States.*—All merchandise and articles coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry free of duty and in no event shall any duties be collected on said merchandise or articles (April 12, 1900, c. 191, sec. 3, 31 Stat. 77).

*Note.* At the 69th Session of Congress section 3 of the Jones Act was amended (S. 4247; Public No. 797). The change does not affect the present cases: (a) It was enacted subsequent to their decision. (b) The legislature of Porto Rico has not yet sought to avail of the additional power conferred. (c) Congress has not *ratified* section 109

of the Act of 1925 (Appendix B). (d) The prohibition against *tariff duties*, contained in section 3 of the Foraker Act and *expressly* continued in force by section 58 of the Jones Act, is left unimpaired. (e) Authority to levy "internal-revenue taxes" on goods "as soon as" or after "brought into the island" does not warrant a *duty* on the entry of an import.

#### APPENDIX D.

*Translation of extract from opinion of Supreme Court of Porto Rico.*

#### IN THE SUPREME COURT OF PORTO RICO.

BENITEZ SUGAR COMPANY, Plaintiff and Appellant, —vs.— RAMON ABOY, JR., Treasurer of Porto Rico, etc., Defendant and Appellee.	}	Appeal from the District Court of Humacao, No. 3223.
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*Opinion of the Court delivered by Mr. Justice Wolf.*

*San Juan, Porto Rico, March 11, 1925.*

This was a suit to recover taxes paid under protest on various articles introduced into Porto Rico from the United States.

As presented by counsel in this case the principal question to be discussed is whether the Foraker Act, insofar as it prohibits a tax on imports, is still the law of this jurisdiction after the pas

sage of our present Organic Act known as the Jones Act.

The Foraker Act provides:

"And in no event shall any duty be collected after the first day of March, 1902, on merchandise and articles going into Porto Rico from the United States, or coming from Porto Rico into the United States."

Section 58 of the Jones Act says:

"Section 58.—That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs, and duties on importations into Porto Rico prescribed by the Act of Congress entitled 'An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes,' approved April twelfth, nineteen hundred, are hereby continued in effect, and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed."

This section in itself would seem to continue in force the said cited section of the Foraker Act. We feel bound to hold that there is nothing in the Jones Act that by necessary implication caused a repeal of said section. We have the idea, besides, that it was the intent of Congress to make Porto Rico like the various states where duties on importations from one state to another are expressly excluded by the Constitution of the United States, as follows:

"Art. I, Sec. 9, subdivision 5.—No tax or duty shall be laid on articles exported from any State. Id., Section 10, subdivision 2.—No

state shall, without the consent of the Congress, lay any imposts or duties on imports, or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

So much being premised, we may examine section 18 of the Act of 1921, it provides:

"Sec. 18.—Motor vehicles and accessories.—On all motor vehicles, automobiles, motorcycles, sidecars for motorcycles, motors for bicycles and launches, auto trucks, auto cars, electric cars, auto tractors and tractors (excluding agricultural tractors), and all solid or pneumatic tires, inner tubes, and on all parts and accessories for any of the articles enumerated in this paragraph, produced, manufactured, introduced or brought into Porto Rico, a tax of ten (10) per cent ad valorem."

As appellant points out, referring to the *Fantauzzi* case, reported under the name of *Successors of C. & J. Fantauzzi vs. Municipal Assembly of Arroyo*, 30 P. R. R. 390, these taxes sought to be imposed are clearly imposts or excises. They do not purport to be a property tax or one imposed on existing property but the whole scheme of said section 18 is to reach specialties like manufactures or importation and the like. We agree with counsel on both sides that the mere fact that section 18 does not use the word "import" can make no difference. To introduce or bring into Porto Rico is synonymous with importing. • • •

Supreme Court of the United States

OCTOBER TERM, 1926

U. S. SUPREME COURT, U. S.

FILED

APR 4 1927

STANBERRY  
CLERK

No. [REDACTED] 214

ADOLFO VALDES, PIO PEREZ, LUIS C. CUYAR,  
*et al., etc.,*

*Petitioners,*

*vs.*

JUAN G. GALLARDO,  
*Treasurer of Porto Rico.*

No. [REDACTED] 215

FINLAY, WAYMOUTH & LEE, INC.,

*Petitioner,*

*vs.*

JUAN G. GALLARDO,  
*Treasurer of Porto Rico.*

No. [REDACTED] 216

ANGEL ABARCA PORTILLA, RAFAEL ABARCA  
PORTILLA, ENRIQUE ABARCA SANFELIZ,  
*et al., etc.,*

*Petitioners,*

*vs.*

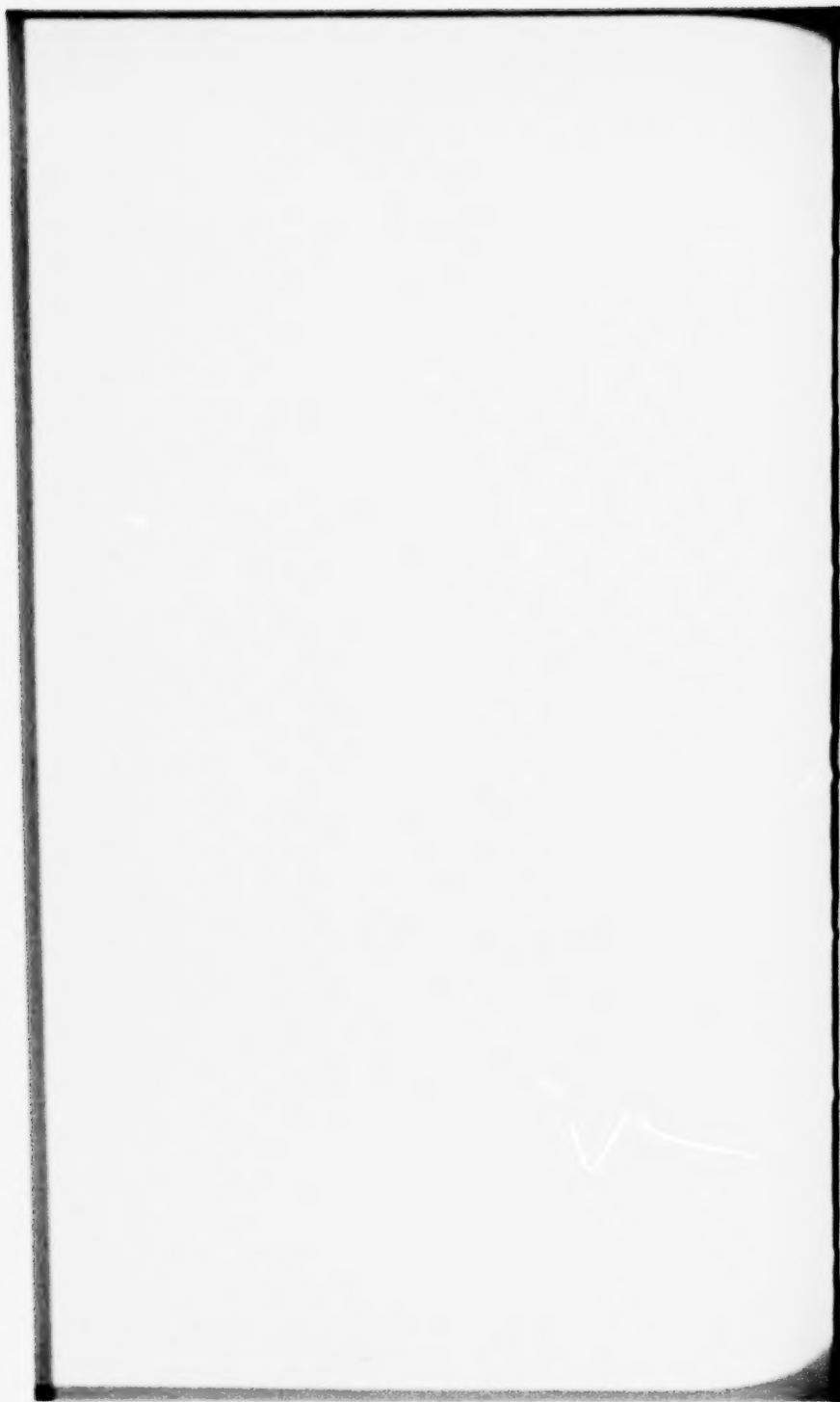
JUAN G. GALLARDO,  
*Treasurer of Porto Rico.*

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Petition for Writs of Certiorari to United States Circuit  
Court of Appeals for the First Circuit, and Brief in  
Support Thereof.

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# Supreme Court of the United States,

OCTOBER TERM—1926.

ADOLFO VALDES, PIO PEREZ, LUIS C.  
CUYAR, *et al.*, etc.,

*Petitioners,*

*vs.*

JUAN G. GALLARDO, Treasurer of Porto  
Rico.

No.

FINLAY, WAYMOUTH & LEE, INC.,

*Petitioner,*

*vs.*

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No.

ANGEL ABARCA PORTILLA, RAFAEL ABARCA  
PORTILLA, ENRIQUE ABARCA SANFELIZ,  
*et al.*,

*Petitioners,*

*vs.*

JUAN G. GALLARDO, Treasurer of Porto  
Rico.

No.

## **PETITION FOR WRITS OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.**

TO THE HONORABLE THE SUPREME COURT OF THE UNITED  
STATES:

The petitioners above named respectfully show:

1. These are part of a numerous series of cases involving the validity, under the Constitution of the United States

and the Organic Act of Porto Rico, of a tax statute enacted by the Legislature of Porto Rico. They present questions as to the power of that Legislature to impose taxes upon articles of merchandise brought into Porto Rico from the United States and foreign countries. Some of these questions of Federal law have not been but should be settled by this court. Others have been decided in a way believed to be in conflict with applicable decisions of this court.

Discrimination against such articles is alleged, and the questions thus affect, not only all the People of Porto Rico, but, also, all merchants here and abroad who sell goods in Porto Rico.

The discrimination is such that if effected by a *State* it would invalidate the statute under the commerce clause of the Constitution. One of the important questions thus is: May Porto Rico burden or regulate commerce between Porto Rico and a State or a foreign country in a way in which a State cannot burden or regulate interstate or foreign commerce? Other questions are stated below.

2. Applications for certiorari in three other cases of the series are being simultaneously presented by other counsel. The questions there urged are present in these cases also; *but the questions here urged are not presented in those cases.* The six cases have been selected as test cases. Some of the others are being held in the court below under orders staying mandates and extending the time for seeking rehearing until after the decision of this Court in the cases now presented to it. There are still others in the court below not yet decided.

3. Petitioners are Porto Rican merchants. They deal in a great variety of articles which they import from foreign countries and from the States. They brought bills in equity in the District Court of the United States for Porto Rico to enjoin respondent, Treasurer of Porto Rico, from

enforcing the *excise* and *sales* taxes imposed by the statute in question.\* The District Court dismissed the bills January 18, 1926 (R. 62, 63; see Opinion, R. 44-59). Upon appeals duly taken, the Circuit Court of Appeals, on January 7, 1927, enjoined enforcement of the taxes as to importations from *foreign countries* sold by the importers in the original packages (R. 137), but otherwise sustained the statute (See Opinion, R. 136-138; reported, *Porto Rico Tax Appeals*, 16 Fed. [2d] 545).

The first two cases in the caption of this petition were remanded for further proceedings not inconsistent with that opinion (R. 140). In the third case the decree of the District Court was affirmed (R. 141).

4. The statute assailed imposes two classes of taxes—one designated as *excise taxes* and the other designated as *sales taxes*. So far as here involved, both in reality are taxes on sales. As construed and applied by respondent, the tax in each instance is on the *first sale of the taxable article in Porto Rico* and applies to articles brought into Porto Rico from the United States and foreign countries as well as to articles manufactured or produced in Porto Rico. The basis of value upon which some of the taxes are fixed is the *cost* of the article "*plus* a reasonable profit to be estimated at ten per cent of said cost if such person (the person making the sale) fails to prove, to the satisfaction of the treasurer of Porto Rico, that the profit obtained on such article is less than the aforesaid percentage." In other instances the tax is computed upon the *sale price* of the article. After first imposing the tax upon "any articles

\*Act No. 85 of August 20, 1925, approved by the Governor of Porto Rico on that day and entitled "An Act to Provide Revenues for the People of Porto Rico by Levying Certain Sales Taxes and Taxes for the Manufacture, Use, Sale and Consumption of Certain Products, and by the Levying of Certain Excise and License Taxes on Certain Occupations, Industries and Businesses; To Impose Certain Penalties; To Repeal the Laws in Force Providing for Excise and License Taxes and for Other Purposes."

the object of commerce", the statute excepts and relieves certain articles from the tax. Certain persons are also exempted.

5. In consequence of being imposed upon the first sale in Porto Rico, the taxes are discriminating in their incidence against articles imported into Porto Rico; and for that reason the law is claimed to be void. For example, a Porto Rican merchant buys shirts in New York for \$32 per dozen, has them shipped to Porto Rico, and sells them there at retail at \$4.00 each or \$48.00 for the dozen. He has to pay a tax of 2% of \$48, viz., 96 cents. If he bought the same shirts from a Porto Rican manufacturer he *would not have to pay any tax* because his sale would not be the first sale of those shirts in Porto Rico. It is true that the Porto Rican manufacturer would pay a tax when he sold the shirts to the merchant, but that tax would be 2% of only \$32, viz., 64 cents. The tax upon imported shirts is thus fifty per cent. higher than the tax upon Porto Rican shirts. The merchant pays a tax if he buy abroad, but pays no tax if he buy in Porto Rico.

The court below utterly failed even to consider this question even though it was fully argued. Its reference to its prior decision in *West India Oil Co. v. Gallardo*, 6 Fed. (2d) 523, at R. 137, 138, is wholly inapposite because that case related only to automobiles, which are not manufactured in Porto Rico, and hence this question of discrimination was not and could not have been raised in that case. The present petitioners deal in articles of a class which *are* manufactured and produced in Porto Rico as well as brought there from the outside, and hence are directly affected by the discrimination.

6. In consequence of the different bases of value specified in the statute for the computation of some of the taxes, the statute operates unequally as between members of the

same class and therefore violates the uniformity clause of the Organic Act of Porto Rico and the equal protection of the laws clauses of the Organic Act and of the Fourteenth Amendment. The equal protection of the laws is denied, and a lack of uniformity is created, by inequality of valuation as well as by inequality of rate. For example, take an article the cost of which is \$100, and the tax rate upon which is 7%. Dealer A sells the article, at a loss, for \$50, but he yet must pay a tax of \$7.00, for under Section 4 the basis of valuation for computing the tax is never less than cost, entirely irrespective of the sale price. Dealer B sells the same article at cost and pays a tax of \$7.00. In its actual incidence, therefore, the tax on A's sale is at the rate of 14%, while the tax on B's sale is at the rate of 7%. Dealer C sells the same article for \$110 and Dealer D sells the same article for \$120. Under Section 4 both C and D pay a tax of \$7.70 (7% of cost plus 10%), so that the actual rate paid by D is a less percentage of his selling price than is the rate paid by C. That, too, despite the fact that D made more money on his sale. In other words, gross profits up to 10% are taxed, but gross profits in excess of 10% are free of tax.

This question, also, was utterly ignored in the opinion of the court below.

7. Although the Fourteenth Amendment does not require uniformity of taxation, the Organic Act of Porto Rico does. In addition to a requirement of equal protection of the laws, it provides that "the rule of taxation in Porto Rico shall be uniform" (Act of March 2, 1917, 39 Stat. 951, Sec. 2). In consequence, therefore, of the fact that out of the total class of "articles the object of commerce" the tax statute here assailed specifies certain articles which are thereby exempted from the taxes, and out of the total class of "persons making such sales" certain of those persons are exempted, these cases squarely pre-

sent the question whether a legislature which is expressly required to impose taxes according to uniform rule has the power to grant exemptions. *That question, we believe, never has been passed upon by this court.* The prevailing rule in the State courts is that a requirement of uniformity precludes the legislature "from either expressly exempting part of the property from taxation, or accomplishing the same result by a failure to tax such property" (*Cooley on Taxation*, 4 ed. sec. 273).

This question, also, has been ignored by the court below.

8. If the exemptions granted by Section 83 of the statute here assailed be regarded as classifications, as distinguished from exemptions, they violate the Fourteenth Amendment (and also the equal protection clause of the Organic Act) because the classifications, so-called, are unreasonable and arbitrary. The statute excludes gas and electric current but includes kerosene and tallow candles; excludes fertilizers but includes seeds and agricultural implements; excludes crops and livestock when sold by agriculturists, but includes them if sold by someone else; excludes sales by agriculturalists of their crops and livestock, but includes their sales of milk and cream and pork and beef and mutton; excludes newspapers, but includes magazines; excludes newspaper advertisements, but includes magazine advertisements; excludes literary and scientific and philosophical works, but includes Bibles and other religious works. Wholesalers and retailers of *non-domestic* products are subjected to the tax, while wholesalers and retailers of domestic products are exempted.

The court below failed to consider this question also.

9. In short, the very brief *per curiam* opinion by which these cases were disposed of below contains no discussion of the vitally controlling questions, and we feel justified in

saying that the belief and intent of the court below was that the cases should come here for final determination.

10. In addition to the foregoing, we feel we should call the court's attention to the fact that *since the decrees below were rendered*, and during the closing days of the last session of Congress, the Organic Act of Porto Rico was amended in two respects which may be claimed to have a bearing upon these cases (Act of March 4, 1927, 69th Congress, Public No. 797, S. 4247). *First*, Section 3 was amended by inserting a clause to the effect that the internal revenue taxes there authorized may be levied and collected on the articles subject to said tax "as soon as the same are manufactured, sold, used, or brought into the island; provided, that no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico." *Second*, Section 48 was amended by inserting the following: "No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

Whatever else may be said of the amendment to Section 3, it certainly declares expressly what petitioners insist always was the law, viz., that there must be no discrimination against articles from the United States and foreign countries.

The amendment to Section 48 already is being invoked as a bar to other cases now pending in the court below, and thus raises several questions. See Brief at pp. 29-33 below. If held applicable to these cases a constitutional question may be presented as to whether the amendment is not invalid as depriving taxpayers of any remedy whatever.

These questions affect many other cases and it is to the public interest that they be decided speedily; and this constitutes an additional ground for certiorari in these cases.

11. There is presented herewith a certified transcript of the records of the above entitled causes in the Circuit Court of Appeals.

WHEREFORE petitioners respectfully pray for the allowance of writs of certiorari to the United States Circuit Court of Appeals for the First Circuit, to the end that these causes may be certified to this court for determination by it as provided in Section 240-A of the Judicial Code as amended by Act of February 13, 1925.

CARROLL G. WALTER,  
*Counsel for Petitioners.*

I hereby certify that I have examined the foregoing petition and that in my opinion the same is well founded and that the cases are such that the prayer of the petition should be granted by this court.

CARROLL G. WALTER.

## **BRIEF IN SUPPORT OF FOREGOING PETITION.**

The opinions of the court below are reported in 16 Fed. (2d) 545, and are printed at R. 116-124; 136-138. The opinion of the District Court, unreported, is printed at R. 44-59.

### **Grounds of Jurisdiction.**

The decrees to be reviewed were rendered January 7, 1927 (R. 140, 141).

The claims advanced in the lower courts as the basis of this court's jurisdiction are that the Porto Rican tax statute, Act No. 85 of August 20, 1925, is in conflict with the Constitution of the United States and the Organic Act of Porto Rico (Act of Congress of March 2, 1917, 39 Stat. 951). These claims were made in the bills (R. 1-8; 70-79; 88-95) and repeated in the assignments of error (R. 64-68; 82-85; 114-116).

Jurisdiction of this court is invoked under Sec. 240a of Jud. Code as amended by Jurisdictional Act of February 13, 1925 (266 U. S. 692, 693), the language of which sustains the jurisdiction.

### **Statement of the Case.**

The bills in all the cases are substantially identical. The one by Finlay, Waymouth & Lee, Inc., was disposed of in the District Court upon a motion to dismiss which, of course, admitted all averments of fact therein contained. The bills attack the validity of the statute. The case thus may be sufficiently stated by summarizing the statute and the averments in the one bill which was dismissed on motion.

## THE STATUTE.

The statute here assailed is exceedingly lengthy, and quotation in full would needlessly burden the Court.

Somewhat expanding the summary given in paragraph 4 of the petition, it is sufficient to say:

Title I defines the terms used, and includes Sections 4 and 5, which read as follows:

“SECTION 4.—*Definition of the Phrase 'Ad Valorem'.*—For the purposes of this Act, the phrase '*ad valorem*' shall be construed to mean the cost of the article when in possession of the person, plus a reasonable profit to be estimated at ten (10) per cent of said cost, if such person fails to prove, to the satisfaction of the Treasurer of Porto Rico, that the profit obtained on such articles is less than the aforesaid percentage; *Provided*, That the word 'person' as used in this section shall have the meaning given thereto in section 5 of this Act.

“SECTION 5.—*Person.*—The word 'person' as used in this Act, shall include not only all natural persons and all manufacturers or dealers, but also all partnerships, associations of all classes, limited liability joint-stock companies (*sociedades anónimas*), companies, corporations or any other artificial person.”

Title II is headed “Excise Taxes.” Section 16 thereof says: “There shall be collected and paid, once only, an internal-revenue tax on each of the following articles:” Forty-four articles are then enumerated, including matches, arms and ammunition, motor vehicles, pianos, phonographs, glass show cases, cash registers, adding machines, typewriters, linoleum, &c. As to most of the articles the tax is fixed at a specified per cent *ad valorem*. As to others it is of a specified amount on specified units of measure,

*e. g.*, twenty cents on each gross of boxes of matches. In each instance it is stated to be upon the production, manufacture, use, sale, transfer, or consumption of the designated articles. So far as involved in these cases the tax is on articles *sold*.

The tax is to be paid by affixing and cancelling revenue stamps on documents or articles (Sec. 35). Dealers are liable for the payment of the tax upon selling or transferring the taxable article to another dealer or consumer (Sec. 37). The tax is to be paid at the time of the sale or transfer by a dealer to another dealer or consumer (Sec. 39). The tax on articles manufactured in Porto Rico is to be paid by the manufacturer, who is declared to be "the only one liable for said taxes upon selling or otherwise disposing of the same and before removing them from the factory" (Sec. 42).

There are elaborate inquisitorial provisions enabling the Treasurer to ascertain the amount of taxes due and heavy penalties for failure to pay. Any person who sells or transfers any article subject to the tax without paying the tax at the time is *guilty of a misdemeanor* (Sec. 50), the penalty for which is not less than \$100. or more than \$1,000. or confinement in jail for a term of not less than thirty days or more than one year, and for the second and subsequent offenses both penalties (Sec. 103).

Title III is headed "Sales Taxes." Section 62 thereof provides:

"There shall be levied and collected on the sale of any articles the object of commerce, not specified in Section 16 of this Act or exempted from taxation as provided in said section,\* a tax of two (2) per cent.

\* "The words, "said section," in the phrase "or exempted from taxation as provided in said section" undoubtedly were intended to be "this title," for the exemptions are specified in Section 83 of the Statute and not in Section 16.

on the price or value of the daily sales of such articles, whether such sales are for cash or credit, which tax shall be paid at the end of each month by the person making such sales."

The Treasurer of Porto Rico, respondent here, has construed Section 62 as imposing the sales tax upon only one sale of the same article and is collecting and requiring the payment of such tax only upon the *first sale of the taxable article in Porto Rico*; and according to his construction of the law retailers and other persons are only required to pay the tax where they purchase the taxable articles from manufacturers or dealers in continental United States or in foreign countries.\*

Affidavits showing the gross proceeds of monthly sales must be filed each month (Sec. 63) and the tax is payable without prior demand (Sec. 68).

The tax is to be paid by affixing internal revenue stamps "to documents prepared for that purpose by the Treasurer of Porto Rico" and cancelling said stamps (Sec. 71).

"Every manufacturer, wholesale dealer, retail dealer, representative, commission merchant or any other person making sales" is required to keep books of account as prescribed by the Treasurer and to exhibit the same on demand (Sec. 69).

There are stringent provisions for enforcing the law and severe penalties for violation. The Treasurer may impose administrative fines of twenty-five dollars for each failure to observe his regulations (Sec. 75). Failure to pay the tax within the time and in the manner provided by the law causes a penalty of ten per cent of the amount

\*See paragraph 10 of bill in first case (R. 5), which is admitted in paragraph 10 of answer (R. 11); paragraph 12 of bill in second case (R. 75, 76), admitted by the motion to dismiss (R. 79, 80); paragraph 7 of bill in third case (R. 92), admitted in paragraph 7 of articles thereto (R. 96). The word "whether" in the 12th line of paragraph 10 at R. 5 is a misprint for "where".

due (Sec. 77). Failure to file the monthly statements or refusal to pay constitute misdemeanors with the penalties above specified (Secs. 80, 81, 82).

Certain *exemptions* from the taxes are provided for in Section 83 of the statute, which reads as follows:

"Any person comprised within the provisions of Section 62 of this Act, except manufacturers whose monthly sales do not exceed one hundred (100) dollars, shall be exempt from the payment of the tax specified in this section; provided, that when one person alone shall have several businesses, under separate accounts, the amounts of the monthly sales of these should together amount to less than one hundred (100) dollars so as to be comprised within the exemption hereby established; Provided further, That the tax provided by Section 62 of this Act shall not attach to (1) food stuffs; (2) fluid gas; (3) electric current; (4) fertilizers, as well as all raw material used in the manufacture of fertilizers; (5) charcoal and wood; (6) jewels and precious stones and semi-precious stones; (7) the sales made by agriculturists of their crops and live stock; (8) the sale of newspapers, to newspaper advertisements and literary, scientific, and philosophical works and to public school text books."

#### THE BILL.

The bill sets forth various provisions of the statute, including the definition of the phrase *ad valorem* contained in Section 4 thereof, and the exemption specified in Section 83 thereof, and alleges, among other things:

1. That the so-called excise tax is a discriminating tax that operates unequally upon members of the same class in which plaintiff is included, namely wholesale and retail dealers; that while the tax is on sales the value of the articles upon which the different percentages are assessed

is an entirely arbitrary value or amount that bears no relation to the actual sale price or amount, *e. g.*, a dealer whose gross profit upon the article sold is fifty per cent. pays a tax of approximately five per cent. upon the actual sales price as against a tax of seven per cent. upon the sale of the same article by a dealer whose actual gross profit is ten per cent. or less; and that where a dealer is compelled to sell an article at less than cost the tax is none the less based upon actual cost and the rate of tax is in excess of that imposed on other dealers who sell at cost or at some profit (R. 72).

2. That other wholesale and retail dealers in competition with plaintiff sell some of the same taxable articles at a greater profit than does the plaintiff, and by reason of such larger profits pay a lower rate of tax upon the actual sale price of such articles (R. 72, 73).

3. That said excise tax discriminates against articles manufactured or produced in continental United States and in favor of articles produced or manufactured in Porto Rico in that the tax imposed upon the article the product or manufacture of Porto Rico is upon the cost of the manufacturer or producer of the domestic article plus ten per cent., while the tax on the article imported from continental United States is upon a value or amount that includes not only the manufacturer's but also the wholesaler's or retailer's assumed profit of ten per cent. upon a cost in excess of the manufacturer's cost plus ten per cent.; that this inequality and discrimination is the consequence and result of imposing the tax upon the first sale in Porto Rico instead of imposing the same on the ultimate sale to the consumer; and that plaintiff is thus compelled to pay a tax on its wholesale and retail sales where other wholesalers and retailers purchasing their goods in Porto Rico pay no tax whatever, and the plaintiff is compelled

to pay a higher tax on the imported articles than is levied on the same domestic articles (R. 73).

4. That out of the mass of citizens who sell articles the object of commerce the law segregates from the operation thereof those whose monthly sales of articles the object of commerce do not exceed \$100 and agriculturists with respect to their crops and livestock and vendors of fertilizers and materials for the manufacture of fertilizers, all of whom are members of the same class (R. 75).

5. That there is a large number of retail dealers in Porto Rico who sell principally foodstuffs but who also carry in stock and sell in competition with the plaintiff hardware, implements and other taxable articles, whose individual monthly sales of such taxable articles do not exceed \$100 but whose aggregate sales of such articles amount to several thousand dollars monthly; that the principal business in Porto Rico is agriculture and that sales of agricultural products comprise more than one-half of all sales of articles the object of commerce (R. 75).

6. That by reason of the defendant's construction of the law as imposing the sales tax upon only the first sale of a taxable article in Porto Rico the sales tax also discriminates unlawfully against manufactures and products of continental United States and in favor of domestic or Porto Rican manufacturers and products, and imposes an unequal burden on the former (R. 75, 76).

7. That the defendant requires of the plaintiff the payment of the sales tax on articles imported by the plaintiff from foreign countries and sold by the plaintiff in the original packages or containers in which such articles are imported (R. 76, 77).

8. That both the taxes aforesaid are imposed directly upon the vendors and as to the sales tax the plaintiff will not be able to collect the same from purchasers; that an increase in prices to include such tax or the attempt to pass the same on to the purchasers will result in the destruction of the plaintiff's wholesale and retail business, in that dealers heretofore purchasing from the plaintiff will purchase direct from dealers in continental United States, and the plaintiff's retail business will for the same reason be seriously impaired (R. 77, 78).

### **Specification of Errors.**

1. The court below having sustained petitioners' contention that Porto Rico cannot tax a sale, by the importer in the original package, of an article imported *from a foreign country*, that question is not here presented.

2. Whether or not Porto Rico can tax a similar sale of an article brought into Porto Rico *from the United States* is specifically dealt with in a separate petition by other counsel for writs of certiorari in three other cases of this series, viz., the *Smallwood*, *Orondez*, and *Insular Motor Corporation* cases, the petitions in which are to be presented simultaneously with this petition. Hence that question is not here discussed.

3. **The insistence here relied upon** is that, entirely aside from the two questions above noted, the statute is invalid *in toto* for four reasons:

(a) The taxes are discriminating in their incidence against non-domestic articles and against dealers in such articles. See paragraph 5 of petition, *supra*.

(b) The taxes lack uniformity and deny the equal

protection of the laws because computed upon different bases of values and thus result in inequality of rate as between members of the same classes of articles and dealers. See paragraph 6 of petition, *supra*.

(c) The taxes lack uniformity because certain articles and persons are exempted therefrom. See paragraph 7 of petition, *supra*.

(d) Even if classification be permissible under a requirement of uniformity, and even if the exemptions in this statute be regarded as classifications, the taxes nevertheless deny the equal protection of the laws because the so-called classifications are unreasonable and arbitrary. See paragraph 8 of petition, *supra*.

## ARGUMENT.

### I.

**The taxes are discriminating in their incidence against non-domestic articles, and hence violate the commerce clause of the Constitution; and that clause is applicable to Porto Rico.**

The settled rule upon this subject is succinctly stated in *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 516, in which this court said:

*"A State tax upon merchandise brought in from another State or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State."*

That rule is supported by a long line of cases.\*

It makes no difference whether the discrimination is intentional and deliberate and appears upon the face of the statute, or whether it is inadvertent or incidental or results solely from the practical effect or necessary operation of the statute.\*\* The validity of the statute and of the taxes imposed thereby must be determined, not by the phraseology of the statute, but by its practical operation and effect and by the real nature and actual incidence of the taxes.†

Discrimination may result from inequality of valuation, or the taking of different bases of value, as well as from inequality of rate.††

Consequently, if these taxes, as they actually fall upon non-domestic articles be in fact computed upon a higher basis of value than in the case of domestic articles, a discrimination clearly results.

As the taxes are imposed upon the first sale of an article

\**Woodruff v. Parham*, 8 Wall. 123, 140; *Ward v. Maryland*, 12 Wall. 418, 429; *Wells v. Missouri*, 91 U. S. 275, 278; *Guy v. Baltimore*, 100 U. S. 434, 439, 443; *Webber v. Virginia*, 103 U. S. 344, 350, 351; *Walling v. Michigan*, 116 U. S. 446, 455, 459, 460, 461; *Minnesota v. Barber*, 136 U. S. 313, 319, 320, 322, 323, 326; *Brimmer v. Ebbman* 138 U. S. 78, 82, 83; *Freight v. Wright*, 141 U. S. 62, 66; *Darnell & Son v. Memphis*, 208 U. S. 113, 119, 120; *Reithlehem Motors Co. v. Floyd*, 256 U. S. 421, 426, 427; *Pennsylvania v. West Virginia*, 262 U. S. 553, 596.

\*\**Minnesota v. Barber*, *supra*; *Brimmer v. Ebbman*, *supra*; *Sunshine Bros. v. Curtiss*, *supra*.

†*Thomson v. Kentucky Distillers Co.*, 255 U. S. 288, 292; *St. Louis & S. W. Ry. Co. v. Arkansas*, 235 U. S. 350, 362; *Crow Lock v. Pennsylvania*, 245 U. S. 292; *Standard Oil Co. v. Grasso*, 249 U. S. 389, 394; *Shaffer v. Corton*, 252 U. S. 37, 55; *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346, 348; *Lacoste v. Department of Conservation*, 263 U. S. 545, 550; *Galveston & Co. Ry. Co. v. Texas*, 210 U. S. 217, 227; *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292, 298.

††*Green v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 515, 516; *Cummings v. National Bank*, 101 U. S. 153, 158; *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 36, 37; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 445; *Johnson v. Wells, Fargo & Co.*, 239 U. S. 234, 241, 242, 243; *Crosby on Taxation*, 4 Ed. § 295.

in Porto Rico, it necessarily results that as to *domestic* articles the taxes (except those affected by Section 4, which produces a further inequality to be hereafter noted) are based upon the manufacturer's or producer's sale price, while as to *non-domestic* articles, *i. e.*, articles brought into Porto Rico from the States or from foreign countries, the taxes are computed upon the importer's sale price; and that price includes two elements of value not present in the manufacturer's or producer's price, *viz.*, the cost of transportation and the importer's profit.

Stated in different form, the discrimination is that wholesalers and retailers of *domestic* articles are not taxed *because* they sell domestic articles, while wholesalers and retailers of *imported* articles *are* taxed *because* they sell articles manufactured or produced outside of Porto Rico.

For a concrete illustration of how the discrimination works, see paragraph 5 of petition, *supra*.

This discrimination, based upon the *place of origin* of the goods, and resulting from the necessary operation of a statute which puts the tax on the first sale in Porto Rico instead of upon the sale to the ultimate consumer, renders the statute invalid if the authorities cited above apply to Porto Rico.

Hence the question: MAY PORTO RICO REGULATE OR BURDEN COMMERCE BETWEEN PORTO RICO AND A STATE OR A FOREIGN COUNTRY IN A WAY IN WHICH A STATE CANNOT REGULATE OR BURDEN INTERSTATE OR FOREIGN COMMERCE?

It is settled that "the Constitution of the United States is *in force* in Porto Rico" even though not all its provisions are "applicable" to that island.

*Balzac v. Porto Rico*, 258 U. S. 298, 312, 313.

The commerce clause, taken literally, refers only to commerce "with foreign nations and among the several states and with the Indian tribes." But it has been held

to apply to commerce between a State and a Territory and between a State and the District of Columbia.

*Stoutenburgh v. Hennick*, 129 U. S. 141;

*Hanley v. Kansas City Southern Ry Co.*, 187 U. S. 617.

It has been held, too, that Congress cannot delegate its power to regulate such commerce to a legislative assembly of the District of Columbia.

*Stoutenburgh v. Hennick*, *supra*, at p. 149.

No reason can be conceived, we submit, why the rule with respect to Porto Rico should be different from what it is with respect to the District of Columbia and the other territories. On the contrary, all the reasons which caused the framers of the Constitution to include the commerce clause among its provisions are just as cogent and forceful with respect to Porto Rico as with respect to other territories or possessions. That clause was inserted principally in order to end the evils of *discrimination* by one State against another. Discrimination by Porto Rico against the States, or by the States against Porto Rico, would be just as great an evil.

In *Gibbons v. Ogden*, 9 Wheat. 1, 195, it was said:

"The genius and character of the whole government seem to be, that its action (the action of the commerce clause) is to be applied to *all the external concerns of the nation*, and to *those internal concerns which affect the states generally*; but not to those which are completely within a particular state, which *do not affect other states*, and with which it is not necessary to interfere, for the purpose of executing some of the *general powers of the government*. The *completely internal commerce* of a state, then, may be considered as reserved for the state itself."

Commerce between Porto Rico and a foreign country is one of the "external concerns of the nation" just as much as commerce between New York and a foreign country. Commerce between Porto Rico and the States is something which clearly "affects the States generally." Commerce between Porto Rico and a State is *not* "completely internal commerce of a State" any more than is commerce between New York and New Jersey. There is no more reason why Porto Rico should be permitted to regulate commerce between Porto Rico and a State than there is why New York should be permitted to regulate commerce between New York and New Jersey. Such regulation by Porto Rico is just as much opposed to the "genius and character of the whole government," and freedom from such regulation is just as essential "for the purpose of executing some of the general powers of the government."

In the *Minnesota Rate Case*, 230 U. S. 352, 399, it was said that "the grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority."

Commerce between Porto Rico and the States and foreign countries clearly is a subject of that character. The States themselves, as well as Porto Rico and its people, are intensely interested in seeing that Porto Rico cannot regulate commerce between it and a State; for if such a power exist in Porto Rico the States may be as adversely affected as if another State could make such regulation.

The enumeration of "foreign nations" and "several States" and "Indian tribes" found in the commerce clause undoubtedly was intended to include *all* commerce other than purely internal commerce within the confines of a

single State. It was intended that Congress should have exclusive control over all commerce, other than such purely internal commerce, whether between "States" accurately so-called or other political divisions of the nation of lesser sovereignty. The freedom of commerce established by the commerce clause of the Constitution is the one thing which has enabled the United States to maintain itself as a nation. It is unthinkable that one of its creatures has power to destroy that freedom.

When the States surrendered to Congress their power to regulate their external commerce, they did it for a *quid pro quo*, i. e., the assurance that they themselves could not be discriminated against. They never contemplated that in the course of time there would be created at their doors a hybrid creature to which the enumeration in the Constitution would not apply.

Of course, they realized that there were territories, but they took the precaution of confiding to Congress the power to regulate those territories (Art. 4, Sec. 3, cl. 2), and thus gave further evidence of their determination to secure uniformity and the absence of discrimination. They would have been surprised indeed if they had been told that from those territories Congress could erect a super-sovereignty endowed with power to create the very discrimination against which they were so sedulously guarding.

## II.

**The *ad valorem* excise tax operates unequally between members of the same class, and therefore lacks uniformity and denies the equal protection of the laws in violation of the Organic Act of Porto Rico and of the Fourteenth Amendment to the Constitution.**

By virtue of Section 4 of the statute (*supra*, p. 10), the excise taxes, so far as imposed upon an *ad valorem* basis, are computed upon the cost of the article even though the article be sold for less than cost. In such a case the basis of value upon which the tax is computed is *higher* than the sale price. On the other hand, where the sale price is greater than cost plus ten per cent., the basis of value is *lower* than the sale price.

For an illustration of how this inequality works, see paragraph 6 of petition, *supra*.

Repeated decisions establish that where, despite an apparent equality of rate, taxes are levied upon *different bases of value*, they are void for want of uniformity and also for want of equal protection of the laws.\* The case of *Johnson v. Wells, Fargo & Co.*, 239 U. S. 234, affords a pertinent illustration. There the tax was held invalid because in the case of certain corporations gross income was given controlling effect in determining value, whereas in the case of individuals and other corporations actual value, irrespective of income, was given controlling effect. Here the effect of Section 4 is to make gross income the controlling factor in determining the tax in those cases

\**Cooley on Taxation*, 4 Ed. § 295; *Green v. Louisville & Interurban E. R. Co.*, 244 U. S. 499, 515; *Cummings v. National Bank*, 161 U. S. 153, 158; *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 36, 37; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 445; *Johnson v. Wells, Fargo & Co.*, 239 U. S. 234, 243.

in which the actual gross happens to coincide with cost plus ten per cent. and to disregard the gross income and substitute a purely arbitrary valuation in those cases in which the actual profit is higher than cost plus ten per cent. or less than cost.

We repeat that the actual operation and effect of the law, and not the form or phraseology of the statute, control in determining validity. See particularly *St. Louis S. W. Ry. Co. v. Arkansas*, 235 U. S. 350, 362.

### III.

**The sales tax is wholly void because the exemptions contained in Section 83 make it repugnant to the uniformity clause of the Organic Act.**

We concede that the Fourteenth Amendment does not require uniformity of taxation (*Swiss Oil Corporation v. Shanks*, decided February 21, 1927). Our contention under this point is based solely upon the requirement of uniformity contained in the Organic Act of Porto Rico.

In legislating for Porto Rico, Congress was not content, so far as taxation is concerned, with requiring the equal protection of the laws. After providing for that in the first paragraph of Section 2 of the Organic Act, it went further and, in a subsequent paragraph of the same section, expressly required that "the rule of taxation in Porto Rico shall be uniform".

The difference is emphasized by *Green v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 512, 519, in which this court held the tax invalid under the uniformity clause of the State Constitution, and then stated that in view of that conclusion it was unnecessary to consider whether the tax

was also invalid under the equal protection clause of the Fourteenth Amendment.

By Section 62 the sales tax here involved is imposed on the sale of "any articles the object of commerce not specified in Section 16 of this act (the section imposing the excise tax) or exempted from taxation as provided in said section" (error for Section 83); and the tax is to be paid "by the person making such sale".

By Section 83 any person comprised within the provisions of Section 62 (except manufacturers) whose total monthly sales do not exceed \$100 is exempted from the payment of the tax specified in Section 62. By the same section it is further provided that the tax imposed by Section 62 "shall not attach" to certain specified articles.

Thus, out of the total class of "articles the object of commerce" certain specified articles are exempted; and out of the class of "persons making such sales" certain of those persons are exempted.

*The question is thus squarely presented whether a legislature which is expressly required to impose taxes according to the rule of uniformity has the power to create exemptions.*

Requirements of uniformity in taxation are found in the constitutions of many of the States. In some the requirement is expressly limited to uniformity within a class, but as found in the Organic Act of Porto Rico the requirement is general, universal and unqualified. If such a requirement were construed as meaning only uniformity within a class, the requirement would be rendered meaningless. For if only that were intended, the entire object would have been accomplished by the clause providing for equal protection of the laws. The fact that Congress required uniformity, in addition to requiring equal protection of the laws, thus impels a holding that this uniformity clause is to be construed as permitting no exemptions whatever.

That is the rule established by the weight of authority in the State courts.\*

FURTHERMORE: Even if it were held that the uniformity clause as found in the Organic Act of Porto Rico does not absolutely prohibit any exemptions whatever—that it merely requires uniformity within a class—this sales tax yet could not be sustained. The legislature here has not attempted to classify and impose the tax upon some classes and exempt other classes. It has merely granted exemptions; and *exemption is not classification* (See 37 Cyc. 884; *Adams v. Kykenfall*, 83 Miss. 571, 587). The legislature here has put into one class (a) all articles the object of commerce which are not subjected to the excise tax, and (b) all persons making sales of such articles. Then, out of those classes, it has exempted (a) certain specified articles which clearly fall within the class of articles of commerce not subjected to the excise tax, and (b) all persons, except manufacturers, whose total monthly sales do not exceed \$100.

That is not classification but merely the exemption of certain persons within the class.

\*Attention is called to the following authorities, analysis of which at this time would unduly expand this brief: *Coolley on Taxation*, 4 Ed., Sec. 273; *Consolidated Coal Co. v. Miller*, 226 Ill. 149, 152, 153; *People v. National Ice Co.*, 245 Ill. 141, 146; *People v. McGarry*, 34 Calif. 432, 435, 437, 466, 461, 462; *People v. Eddy*, 43 Calif. 331, 339, 340; *State v. Duluth & Iron Range R. R. Co.*, 77 Minn. 433, 437; *State v. Insurance Co.*, 71 Neb. 320, 334, 337, 338; *Georgia Railroad Co. v. Wright*, 125 Ga. 589, 600; *Atlanta National Ins. Co. v. Stewart*, 109 Ga. 90, 95, 97; *Commonwealth v. Union*, 1 Colo. 407, 460; *Forshaw v. Layman*, 192 Fed. 193, 194, 195; *State National Bank v. Memphis*, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A. (N. S.), 663, 608; *Ex parte Woods*, 52 Tex. Crim. App. 575, 100 S. W. 1171, 16 L. R. A. (N. S.), 450, 452, 459; *City of Knoxville v. Justice of Mayor's Court*, 5 Ohio, 90, 509, 507, 503; *State ex rel Freeman v. Indianapolis*, 69 Ind. 375.

## IV.

**Even if the exemptions be regarded as classifications they deny the equal protection of the laws because unreasonable and arbitrary.**

"The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment", and arbitrary selection can never be justified by calling it classification (*Gulf Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, 159, 163, 165). The classification always "must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed" and "cannot be arbitrarily made without any substantial basis" (*Southern Ry. Co. v. Greene*, 216 U. S. 499, 417, 418). And all persons similarly circumstanced must be treated alike (*Royster Guano Co. v. Virginia*, 253 U. S. 412, 415).

A classification of corporations into foreign and domestic for the purpose of taxation is arbitrary and a denial of the equal protection of the laws (*Southern Ry. Co. v. Greene, supra*). A statute under which domestic corporations doing all their business in the State are taxed upon all income while others doing all their business outside the State are exempt is unconstitutional for the same reason (*Royster Guano Co. v. Virginia, supra*). A statute which puts shares of stock in a class for purposes of taxation and then "breaks into the class and with eyes shut strikes some and lets others go" is likewise void (*People ex rel. Farrington v. Mensching*, 187 N. Y. S. 21). Electric light plants and gas plants cannot be put into separate classes for the purpose of taxation because both furnish light, heat and power and there hence is no fair and substantial basis for the classification (*Lincoln Gas & Electric Light Co. v. City of Lincoln*, 182 Fed. 926). Neither can a classification rest

merely upon the amount of business done (*Colting v. Kansas City Stockyards Co.*, 183 U. S. 113, 114, 112; *State v. Mitchell*, 97 Maine 66, 75, 53 Atl. 887) nor upon the place of origin of the goods taxed (*State v. Hoyt*, 74 Vt. 59, 42 Atl. 975; *People ex rel. Phillips v. Haynes*, 130 N. Y. App. Div. 417, 120 N. Y. Supp. 1993, affirmed 198 N. Y. 559).

In accordance with these principles, the exemptions (or classifications, if such they be) contained in Section 80 can not be sustained. Persons whose monthly sales amount to \$101 are taxed, while those whose monthly sales amount to \$75 are exempt. Foodstuffs and jewels are exempted while hats and shoes and clothing are taxed. Kerosene and tallow candles are taxed while gas and electric current are exempt. Fertilizers are excluded but seeds and agricultural implements are included. Crops and livestock are taxed or exempted according to whether the person who sells them is or is not an agriculturist. Agriculturists must pay a tax upon the sale of milk and cream but not upon the sale of their crops. If they kill a hog and sell the pork they must pay a tax, but if they sell it on the hoof they are exempt. New papers and newspaper advertisements are free, but magazines and magazine advertisements are taxed. A copy of Shakespeare, or of Huxley, Darwin, or Voltaire may be had free, but upon the sale of a Bible there must be a contribution to the public treasury.

The distinctions thus drawn in this statute are, to say the least, as fanciful as those denounced in *Southern Railway Co. v. Greene* and *Register-Examiner Co. v. Virginia*, referred to above.

Finally, and perhaps even more important, the necessary consequence of imposing the tax upon the first sale in Porto Rico is that *wholesalers and retailers of non-domestic products are subjected to the tax while wholesalers and retailers of domestic products are exempt*. When a San Juan merchant sells a suit of clothes he has purchased from the manufacturer in New York, he must pay the tax. When

a competing merchant in San Juan sells a similar suit which was made in Porto Rico, he does not have to pay any tax. The tax thus actually falls upon some wholesalers and retailers and does not fall upon others. *In its actual incidence the tax is thus laid upon some members of a class and not upon others, according to whether they sell domestic or non-domestic products.* Stated in a different form, wholesalers and retailers are classified according to the place of origin of the goods they sell, and that cannot be sustained (See *State v. Hoyt*, and *People ex rel. Phillips v. Raynes, supra*).

## V.

### **Effect of amendment of Section 48 of Organic Act by Act of March 4, 1927.**

1. The amendment by its terms is inapplicable to *pending cases*. Its language is that no suit to restrain the assessment or collection of a tax "shall be maintained in the District Court of the United States for Porto Rico."

In *Mason v. Darden*, 2 Exch. 22 (1848), a statute which provided that "no suit shall be *brought or maintained* in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager" was held inapplicable to cases pending at the time of the enactment of the statute. *Albenson, B.*, said (p. 41):

"If it had been stated 'that no action shall be brought,' or only 'that no action shall be maintained,' it seems to me clear that we should have considered the words 'brought' and 'maintained' as synonymous, and as prohibiting the success of future suits alone. And although the use of both in one sentence makes this *less obvious*, yet, when we consider that to give the more strict interpretation to the word 'maintained'

will compel us to suppose, without further evidence, that the legislature contemplated so gross an act of injustice as, without compensation, to take away an existing right of action already pending, *and that, too, with no provision even for the costs incurred in the enforcing of what was, before the act, a legal right.* I am not disposed to put such a construction on the word, but to treat it, as I think the legislature intended it, as a redundant expression only."

That case was cited and followed in *Grasso v. Holbrook &c. Co.*, 102 N. Y. App. Div. 49, 52.

*Knight v. Lee*, 1 Q. B. 41 (1893), is to the same effect.

In *Burbank v. Inhabitants of Auburn*, 31 Me. 590, a statute providing that "no action shall hereafter be maintained against any city," &c., was held inapplicable to pending cases, the word "maintained" being considered to have the import of *brought*.

A similar decision was made in *Smith v. Lyon*, 44 Conn. 175, 178, in which the court said:

"Nor are we willing to overthrow a rule so firmly founded in justice upon the plaintiff's suggestion as to the word 'maintained'; for we do not think that, as used in the act, it in itself imports retroactive intent on the part of the legislature. A critical analysis of it would doubtless disclose the idea of continuing a life already commenced; *but men both in and out of the profession often speak of maintaining an action, having reference to one yet to be instituted.*"

So, too, in *Creditors' Adjustment Co. v. Russ*, 20 Cal. App. 725, a prohibition against the maintenance of an action was held not to apply to cases brought before the enactment of the prohibition. The court said:

"The word 'maintain' as here used means to commence, institute, begin, or bring."

In addition, U. S. Rev. Stat. Sec. 13 (U. S. Code, Title 1, Sec. 29), is in the nature of a saving clause, if one be needed, preventing the application of the amendment to pending cases. That section is not confined to penal statutes.

*Hertz v. Woodman*, 218 U. S. 205, 217, 218.

2. If the amendment were held applicable to pending cases, substantive rights, and not mere procedure, would be affected, particularly in cases where reliance upon the right to maintain an injunction suit has prevented timely resort to the remedy of paying the tax under protest and suing to recover it back. Under such circumstances the rule against giving a statute retroactive operation applies with peculiar force.

*U. S. Fidelity Co. v. Struthers Wells Co.*, 209 U. S. 306.

3. Even if the amendment were applicable to cases pending in the District Court, it would not affect cases already determined in the District Court or affect the jurisdiction of this court to review decrees of the Circuit Court of Appeals.

The new statute does not amend Section 41 of the Organic Act, which prescribes the jurisdiction of the District Court (39 Stat. 965; U. S. Code, Tit. 48, § 863). It does not amend Section 128 of the Judicial Code (U. S. Code, Title 28, Sec. 225), giving the Circuit Court of Appeals appellate jurisdiction to review final decisions of the District Court for Porto Rico. Neither does it amend Section 240 of the Judicial Code (U. S. Code, Title 28, Sec. 347), giving this court jurisdiction to review decisions of the Circuit Court of Appeals. *The appellate jurisdiction there prescribed remains unchanged.*

While an appeal, unlike a writ of error, may not be technically the institution of a new suit, the perfecting of

the appeal transfers the case from the trial court to the appellate court (*Kegser v. Farr*, 105 U. S. 265; *Morrin v. Lauler*, 91 Fed. 633). Consequently, the prosecution of an appeal cannot be regarded as the maintenance of a suit in the trial court.

Neither appeals nor writs of error ordinarily are regarded as within the purview of statutes affecting "actions" or "suits."

3 *Corpus Juris*, pp. 305, 330.

4. If the amendment be construed as affecting cases already finally determined in the District Court and already taken to a higher court for review, a situation would be presented with respect to which the **decisions of different Circuit Courts of Appeal are in conflict.**

In 1898 the Tucker Act, giving the old Circuit Court concurrent jurisdiction over certain claims against the United States, was amended by providing that such jurisdiction should not extend to cases brought by officers of the United States to recover compensation for official services. Several of such cases already had proceeded to judgment in the old Circuit Court and were pending on writ of error. In the *Fifth* and *Ninth* Circuits it was held that in view of the amendment the writ of error should be dismissed, thus leaving the judgments in force.

*United States v. McCrory*, 91 Fed. 225.

*United States v. Kelly*, 97 Fed. 460.

In the *Second* Circuit it was held that jurisdiction to review still continued.

*United States v. Jacobus*, 96 Fed. 260.

If, despite our contention to the contrary, it should be held that the amendment here involved is analogous to the

1898 amendment of the Tucker Act, this *conflict between different Circuit Courts of Appeal* as to the effect of such a statute will have to be resolved by this court.

**The petition for writs of certiorari should be granted.**

Respectfully submitted,

CARROLL G. WALTER,  
*Counsel for Petitioner.*

April 1927.

# Supreme Court of the United States

October Term, 1926

NO

211

T. H. SMALLWOOD, W. F. SMALLWOOD, A. D. SMALLWOOD, et al., etc.,

Petitioners.

—VS.—

JUAN G. GALLARDO, Treasurer of Porto Rico.

NO

212

ADOLFO VALDES ORDONEZ, SALVADOR GARCIA, VICTOR OCHOA, et al., etc.,

Petitioners.

—VS.—

JUAN G. GALLARDO, Treasurer of Porto Rico.

NO

213

INSULAR MOTOR CORPORATION,

Petitioner.

—VS.—

JUAN G. GALLARDO, Treasurer of Porto Rico.

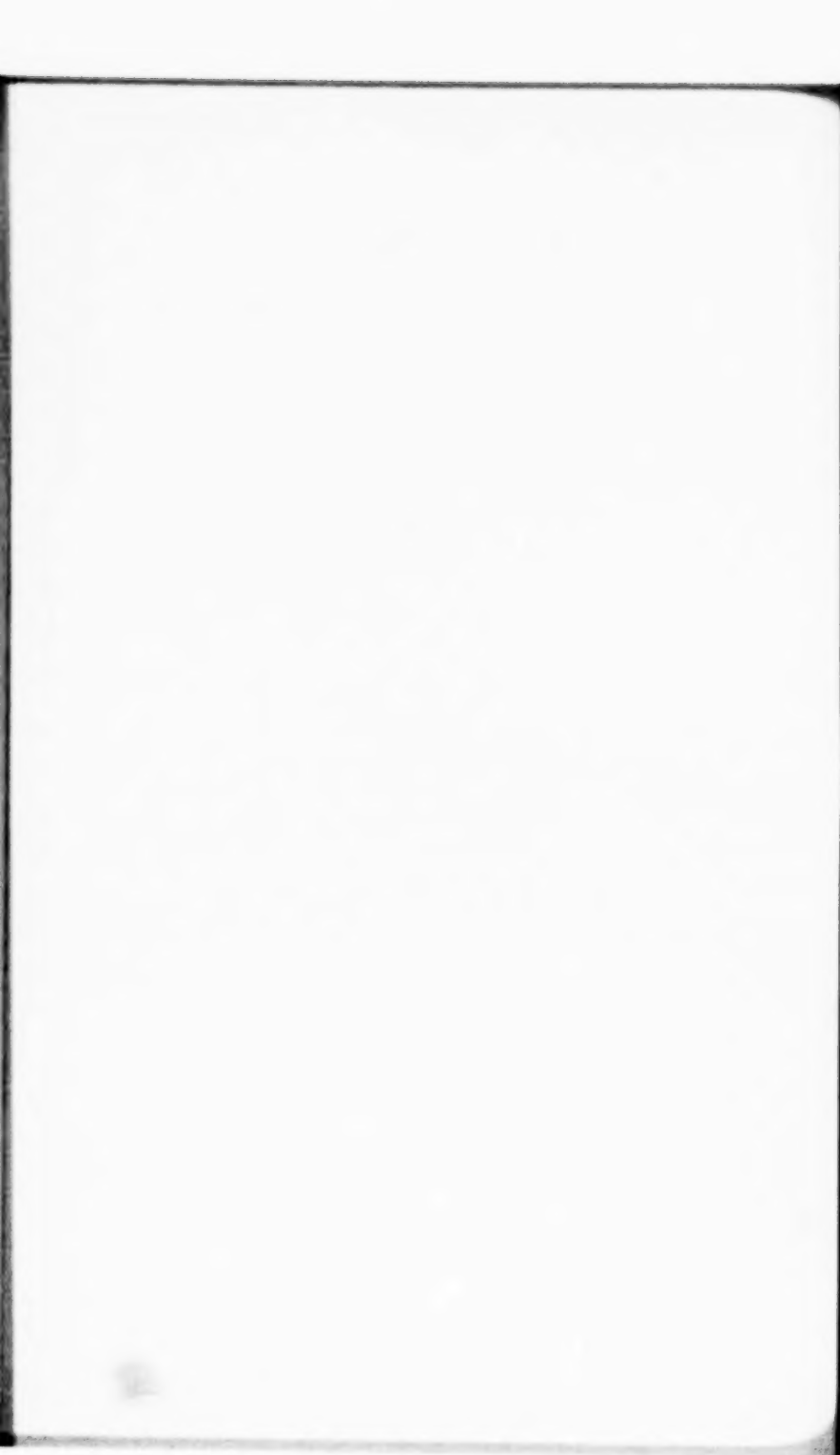
## SUPPLEMENTAL BRIEF FOR PETITIONERS.

FRANCIS G. CAFFEY,

Solicitor for Petitioners,

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New York City.



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# Supreme Court of the United States

OCTOBER TERM, 1926.

T. H. SMALLWOOD, W. F. SMALLWOOD, A. D. SMALLWOOD, <i>et al.</i> , <i>etc.</i> , Petitioners,	No.
—VS.—	
JUAN G. GALLARDO, Treasurer of Porto Rico.	
ADOLFO VALDES ORDOÑEZ, SALVADOR GARCIA, VÍCTOR OCHOA, <i>et al.</i> , <i>etc.</i> , Petitioners,	No.
—VS.—	
JUAN G. GALLARDO, Treasurer of Porto Rico.	
INSULAR MOTOR CORPORATION, Petitioner,	
—VS.—	No.
JUAN G. GALLARDO, Treasurer of Porto Rico.	

## SUPPLEMENTAL BRIEF FOR PETITIONERS.

### VI.

*These cases are not affected by a prohibition, created after their determination below, against restraining the collection of taxes.*

Section 7 of the Act of March 4, 1927 (Public No. 797), amends section 48 of the Jones Act so as to include the following:

That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico.

Since petitioners' original brief was printed information has been received of a contention by respondent in other cases that the clause quoted above rendered moot all pending tax injunction suits which arose in the District Court for Porto Rico. The reason assigned is that the new enactment is retroactive. There is no warrant for that interpretation.

(1) Phrasesology identical in form or substance has been explicitly held inapplicable to actions already instituted.

*Mann vs. Darden*, 2 Exch. (W. H. & G.)  
22;

*Knight vs. Lee*, 1893, 1 Q. B. 41;

*Burbank vs. Inhabitants of Auburn*, 31  
Me. 590;

*Gumpper vs. Waterbury Traction Co.*, 68  
Conn. 424;

*New Carlisle Bank vs. Reurn*, 5 Ohio C.  
D. 94.

The provision as to suits in the statutes involved was in the English cases that they should not be "brought or maintained" and in the other cases, should not be "maintained." It was said that one meaning of *maintain* is *commence or bring* and that it was solely in this sense that the word is used in a statute like that now being considered.

See also:

*Smith vs. Lyon*, 44 Conn. 175;

*Bruenn vs. North Yakima School Dist.*  
No. 7, 101 Wash. 374.

(2) In a long line of decisions this Court has uniformly ruled that only prospective effect will be given to a statute unless the contrary is required by express language or by plain implication. A few recent illustrations will suffice:

*U. S. Fidelity Co. vs. Struthers Wells Co.*,  
209 U. S. 306, 314;

*U. Pac. R. R. vs. Laramie Stock Yards*,  
231 U. S. 190, 199;

*Cameron vs. United States*, 231 U. S. 710,  
720;

*Shwab vs. Doyle*, 258 U. S. 529, 534-7;

*Fullerton Co. vs. Northern Pacific*, 266 U.  
S. 435, 437;

*United States vs. St. Louis, etc., Ry. Co.*,  
270 U. S. 1, 3.

Here neither in terms nor by inference is there the slightest indication of a legislative intent to have the amendment operate retrospectively.

Dated, March 29, 1927.

FRANCIS G. CAFFEY,  
Solicitor for Petitioners.

FILED  
AUG 12 1927

**Supreme Court of the United States**

CHARLES ELMORE CROFT  
CLERK

OCTOBER TERM, 1927.

No. 211.

T. H. SMALLWOOD, W. F. SMALLWOOD, A. D. SMALLWOOD,  
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Petitioners,

—vs.—

JUAN G. GALLARDO, TREASURER OF PORTO RICO.

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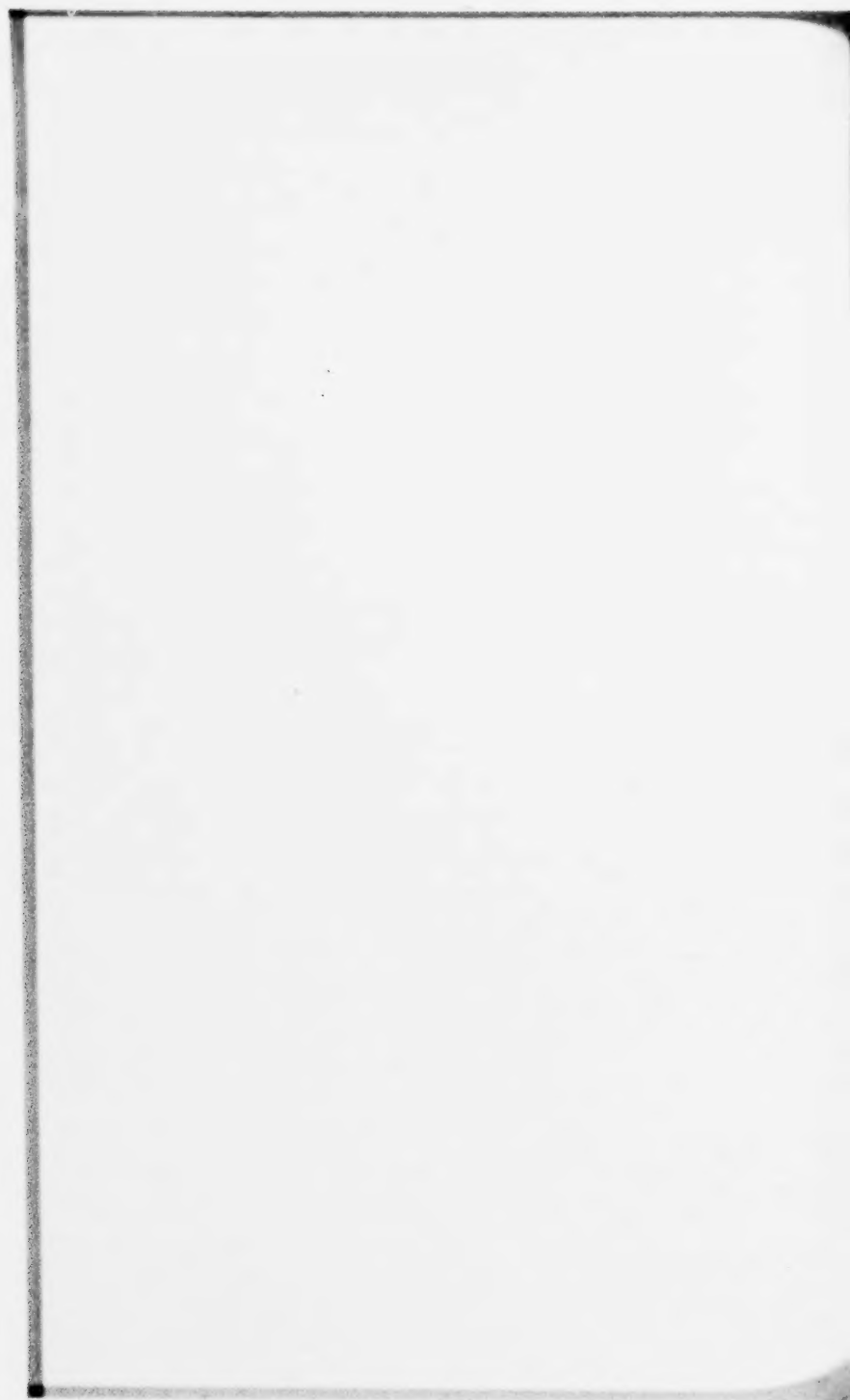
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**BRIEF FOR PETITIONERS.**

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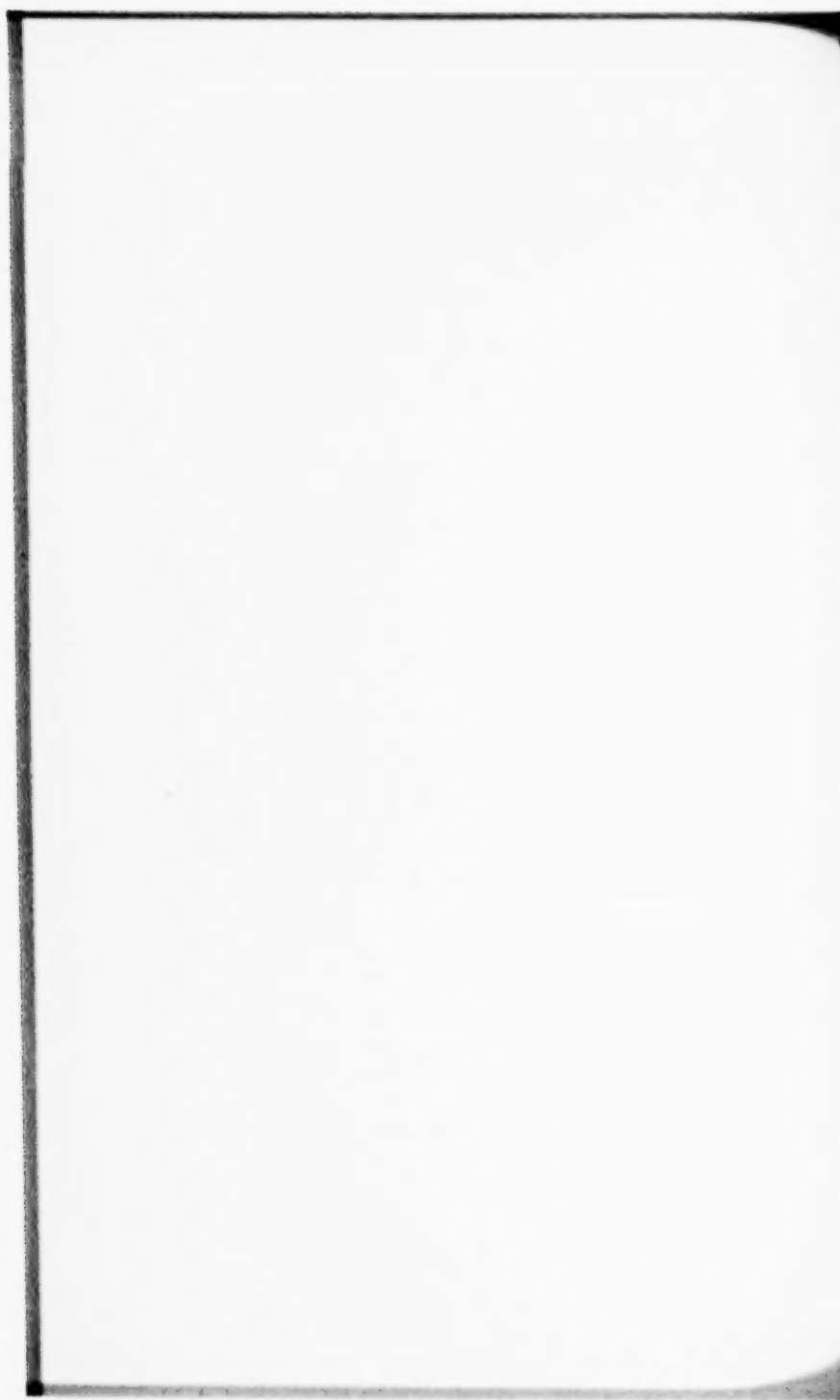
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## Congressional Record, 2nd Sess., 69th Congress



# Supreme Court of the United States

OCTOBER TERM, 1927.

T. H. SMALLWOOD, W. F. SMALL-  
WOOD, A. D. SMALLWOOD, *et al.*,  
*etc.*,

Petitioners,

—VS.—

No. 211.

JUAN G. GALLARDO, TREASURER OF  
PORTO RICO.

ADOLFO VALDES ORDONEZ, SALVA-  
DOR GARCIA, VICTOR OCHOA, *et*  
*al.*, *etc.*,

Petitioners,

—VS.—

No. 212.

JUAN G. GALLARDO, TREASURER OF  
PORTO RICO.

INSULAR MOTOR CORPORATION,  
Petitioner,

—VS.—

No. 213.

JUAN G. GALLARDO, TREASURER OF  
PORTO RICO.

## BRIEF FOR PETITIONERS.

On certiorari to the Circuit Court of Appeals for the First Circuit (71 L. ed. 868; 47 Sup. Ct. 659) to review a decision in a group of cases, of part of which those at bar are typical (*Porto Rico Tax Appeals*, 16 Fed. (2d) 545).

The order of May 16, 1927, awarding the writs set the cases for hearing on October 3 next

"on the sole question whether they have become moot by virtue of the act of March 4, 1927, amending section 48 of the organic act of Porto Rico."

*Statement.*

Petitioners are dealers in automobiles, doing business in Porto Rico. The cars are imported from continental United States. On arrival the ocean carrier delivers them in original packages to petitioners.

In 1923 the legislature of Porto Rico laid an *ad valorem* tax of 10% and in 1925 of 7% on the automobiles. Petitioners brought bills in the District Court of the United States for Porto Rico to enjoin the respondent from collecting the tax and from seizing their property for its non-payment (R. 213, 59-70, 76-84). The principal ground of attack is that the statutes violate a provision of the Organic Act prohibiting levy of duties on merchandise going into Porto Rico from the United States (R. 104, 67-8, 81). The District Court, after hearing two of the cases on proof and one on motion (R. 22-52, 71, 84-7, 111-120), dismissed the bills (R. 57-8, 71-3, 107-8) and its decrees were affirmed by the Circuit Court of Appeals for the First Circuit (R. 153-4).

The District Court was of opinion that complainants had an adequate remedy at law. This consisted of payment under protest and actions to recover the amounts claimed to have been improperly exacted (R. 53, 72, 89-105). The Court of Appeals held with petitioners on the form of remedy they pursued, but adverse to them on the merits (R. 150-2).

Subsequent to determination of the causes in the Court of Appeals, §48 of the Organic Act (39 Stat. 967, c. 145; U. S. Code, Title 48, §872) was amended by §7 of the Act of March 4, 1927 (Public No. 797, Second Session, 69th Congress; U. S. Code, Supp. No. 3, April, 1927, p. 92; Fed. Stats. Ann., Supp. No. 3, April, 1927, p. 92; 44 Stat. c. 503), adding the following:

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

#### *Taxes.*

The statute laying the tax complained of in Nos. 211-2 (Laws of 1923, pp. 450, 458) provides in section 20, subdivision 18, as follows:

"Section 20. That there shall be levied, collected and paid, for one time only, as an internal-revenue tax on each of the following articles: • • •

18. *Motor vehicles.* On every motor vehicle, automobile, • • • produced, manufactured, sold or used in Porto Rico, a tax of ten (10) per cent *ad valorem*."

The statute prescribing the tax complained of in No. 213 (Laws of 1925, pp. 590, 596) provides in section 16, subdivision 15, as follows:

"Section 16. There shall be collected and paid, once only, an internal-revenue tax on each of the following articles: • • •

15. *Motor vehicles.* On every motor vehicle such as automobiles, • • • sold, transferred, used or consumed in Porto Rico, a tax of seven (7) per cent *ad valorem*."

#### *Jurisdiction.*

Due to the restrictive terms of the order under which we are now proceeding, recital of the grounds of jurisdiction, set out in the petition for certiorari (pp. 8-9), is omitted. Likewise for the reason that this Court has precluded present discussion of the subject, as well as for the reason that the

respondent is not being heard on cross-assignments of error, it will be assumed that the court below was correct in holding (R. 150-1) that prior to March 4, 1927, owing to inadequacy of the remedy at law, the District Court for Porto Rico was vested with power to issue the injunctions prayed for (in regard to which petitioners' contention is set out in the record, pp. 138-150).

### *Propositions.*

The statutory change has not rendered the cases moot, because

(1) The Act of March 4, 1927, did not affect cases pending at the time of its passage.

*Gallardo v. Porto Rico Ry., Light & Power Co.*, 18 Fed. (2d) 918, 925 (1 C. C. A., 1927).

(2) If the Act of March 4, 1927, had been in effect when the suits were commenced, it would not have deprived the District Court for Porto Rico of power to grant the relief sought.

*Hill v. Wallace*, 259 U. S. 44, 62.

(3) The authorities relied on by respondent are inapplicable.

### **ARGUMENT.**

#### **I.**

*The Act of March 4, 1927, did not affect cases pending at the time of its passage.*

§§24 and 267 of the Judicial Code authorize a district court of the United States to entertain, and to grant injunctions in, equity suits involving upwards of \$3,000, exclusive of interest and costs, arising under the laws of the United States, where there is no adequate remedy at law.

§41 of the Organic Act, as later shown, gives the District Court for Porto Rico the jurisdiction of a district court of the United States. As it is being taken for granted that, in exercise of that power, the District Court for Porto Rico, upon application to it at any time up to March 4, 1927, ought to have issued the injunctions prayed for in the bills, it follows that the question the parties are directed to argue is confined to whether, without amendment to or change of §§24 and 267 of the Judicial Code or §41 of the Organic Act, a mere prohibition against the present type of suit being "maintained" is sufficient to oust jurisdiction in cases already pending. The problem turns exclusively on the meaning of "maintained."

(1) Where the precise issue has arisen it has been squarely, and it is believed uniformly, held by courts other than this, including the Circuit Court of Appeals for the First Circuit, that the language of the Act of March 4, 1927, does not apply to suits brought before that date (*Gallardo v. Porto Rico Ry., Light & Power Co.*, 18 Fed. (2d) 918, 925, 1 C. C. A., 1927; *Moon v. Darden*, 2 Exch. (W. H. & G.) 22, 32-45, 154 *English Rep.* (full reprint) 389; *Knight v. Lee*, 1893, 1 Q. B. 41; *Burbank v. Inhabitants of Auburn*, 31 Me. 590, 591; *Delta Bag Co. v. Kearns*, 160 Ill. App. 93, 99-100, 105; *Smith v. Lyon*, 44 Conn. 175, 178; *Gumpper v. Waterbury Traction Co.*, 68 Conn. 424; *Brucenn v. North Yakima School Dist. No. 7*, 101 Wash. 374, 378-9; *Creditors' Adjustment Co. v. Rossi*, 26 Cal. App. 725, 727; *Grasso v. Holbrook, etc. Co.*, 102 N. Y. App. Div. 49, 51-2; *Union Carlisle Bank v. Brown*, 5 Ohio C. D. 94).

So far as discovered, this Court has not directly passed on the same language. Nevertheless, it has firmly established canons of statutory interpretation which are inconsistent with any other conclusion.

(2) There is a presumption that a statute does not apply to a case pending at the time of its enactment (*McEwen v. Den*, 24 How. 242, 244; *Twenty Per Cent. Cases*, 20 Wall.

179, 187; *Shwab v. Doyle*, 258 U. S. 529, 534; *Leicellyn v. Frick*, 268 U. S. 238, 251-2; *United States v. St. Louis, etc., Ry. Co.*, 270 U. S. 1, 4).

This principle has been reiterated in a variety of forms. Thus it has been said that, despite the words employed and although literally the language covers existing cases, unless the contrary plainly be required new statutes will be applied only to "future cases" (*McEwen v. Den*, at p. 244) or "cases that may hereafter arise" (*Twenty Per Cent. Cases*, at p. 187) and will not be applied to "cases which arose before their passage" (*Shwab v. Doyle*, at p. 534).

Much ancient learning on the subject is assembled in *Dash v. VanKleeck*, 7 Johns. R. 477, 501-9, and *Gould v. Hayes*, 19 Ala. 438, 450-1. The State decisions generally are in accord. For example, see *Gerry v. Stoneham*, 1 Allen 319, 322-3; *Dickens v. Dickens*, 174 Ala. 305, 310-1; *Wallace v. Gorgun Short Line R. R. Co.*, 16 Ida. 103, 114-5; *Rogers v. Greenbush*, 58 Me. 395, 397; *Auditor General v. Chandler*, 108 Mich. 569, 571; *Trist v. Cabezas* 2 Rob. (N. Y.) 708, 710, 18 Abb. Pr. 143, 144-5; *Bates v. Stearns*, 23 Wend. 482; *Merwin v. Ballard*, 66 N. C. 398, 399; *Lilly v. Purcell*, 78 N. C. 82; *Newson v. Greenwood*, 4 Oregon 119, 121-2.

An apt statement on the point in *Trist v. Cabezas*, cited with approval in *Fitzpatrick v. Boylan*, 57 N. Y. 433, 437, was this (p. 710):

"In all statutes which affect or change a remedy, it is but fair to presume that it was intended to exempt pending cases and proceedings from their operation, unless the contrary appears; • • • When the statute is silent, it must be presumed that it was the intention to limit its operations to the period of time when it took effect, and to fasten its provisions only upon such proceedings as might be commenced thereafter."

(3) No doctrine has been more steadily adhered to by this Court than that statutes will be given prospective

operation only unless it clearly, unequivocally and affirmatively appear that it was the legislative intention to have them operate retrospectively.<sup>1</sup> Thus, some of the adjectives employed to describe the kind of requirement which alone will justify construing the language of a statute as retroactive in effect are "imperative" (*United States v. Heth*, 3 Cranch at p. 413; *Auffm'ordt v. Rasin*, 102 U. S. at p. 622; *United States Fidelity Co. v. Struthers Wells Co.*, 209 U. S. at p. 314), "indispensable" (*Reynolds v. McArthur*, 2 Peters at p. 434), "irresistible" (*Carroll v. Lessee of Carroll*, 16 How. at p. 281), "necessary" (*Harvey v. Tyler*, 2 Wall. at p. 347) and "manifest" (*Shreveport v. Cole*, 129 U. S. at p. 43).

Three illustrations on the facts will suffice.

In *Twenty Per Cent. Cases*, 20 Wall. 179, a resolution of February 28, 1867 (14 Stat. 569), granted to certain Government employes serving at Washington a gratuity of 20% on their salaries or pay for the fiscal year ending June 30, 1867. By §1 of the Act of July 12, 1870 (16 Stat. 250, c. 251), it was provided that all acts and resolutions granting extra compensation or pay "be, and the same are hereby, repealed, to take effect on the first day of July, eighteen hundred and seventy."

Some suits were pending at the date of the repealing act, and some were brought thereafter, in the Court of Claims (p. 180) to recover under the resolution. The

<sup>1</sup>*United States v. Heth*, 3 Cranch 399, 413; *Reynolds v. McArthur*, 2 Peters 417, 434; *Murray v. Gibson*, 15 How. 421, 423-5; *Carroll v. Lessee of Carroll*, 16 How. 275, 279-282; *McEwen v. Den*, 24 How. 242, 243-4; *Harvey v. Tyler*, 2 Wall. 328, 346-7; *Sohn v. Waterson*, 17 Wall. 596, 598-9; *Twenty Per Cent. Cases*, 20 Wall. 179, 187; *United States v. Moore*, 95 U. S. 760, 762; *Auffm'ordt v. Rasin*, 102 U. S. 620, 622; *Chen Heong v. United States*, 112 U. S. 536, 558-560; *Shreveport v. Cole*, 129 U. S. 36, 43; *United States v. Burr*, 159 U. S. 78, 82-7; *City Railways Co. v. Citizens' Railroad Co.*, 166 U. S. 557, 565; *Southwestern Coal Co. v. M. Bode*, 185 U. S. 499, 503-4; *White v. United States*, 191 U. S. 545, 552; *United States v. American Sugar Co.*, 262 U. S. 563, 577; *U. S. Fidelity Co. v. Struthers Wells Co.*, 209 U. S. 306, 314-7; *Winfree v. Nor. Pac. Ry. Co.*, 227 U. S. 296, 301-2; *Summers v. United States*, 231 U. S. 92, 105-6; *Un. Pac. R. R. v. Laramie Stock Yards*, 231 U. S. 190, 199; *Cameron v. United States*, 231 U. S. 710, 720; *Shrout v. Doyle*, 258 U. S. 529, 534-7; *Fullerton Co. v. Northern Pacific*, 266 U. S. 435, 437; *Levelllyn v. Ford*, 268 U. S. 238, 251-2; *United States v. St. Louis, etc. Ry. Co.*, 270 U. S. 1.

Government insisted (p. 186) "that the repealing act, even if the resolution created an implied contract and gave jurisdiction to the Court of Claims to enforce it, divested the Court of Claims of all jurisdiction in such controversies."

In holding to the contrary, this Court said (p. 187):

"Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."

In *United States v. St. Louis, etc., Ry. Co.*, 270 U. S. 1, carriers had causes of action against the Government for transportation charges prior to February 28, 1920. By Act of that date (41 Stat. 456, c. 91), amending paragraph 3, §16, of the Interstate Commerce Act, it was provided that action by a carrier for recovery of charges must be "begun within three years from the time the cause of action accrues and not after." These actions were commenced in the Court of Claims subsequent to three years from February 28, 1920. While they were pending the Act of June 7, 1924 (43 Stat. 633, c. 325), amended paragraph 3 by adding the following:

"(b) The provisions of this paragraph (3) shall extend to and embrace cases in which the cause of action has heretofore accrued as well as cases in which the cause of action may hereafter accrue."

Notwithstanding the broad language in which the amendment was expressed, this Court said (p. 4) :

"It is not to be assumed that Congress intended by that amendment to defeat claims on which suits duly brought were then pending, or on which, as in the cases at bar, judgment had already been entered below."

In *White v. United States*, 270 U. S. 175, a suit in regard to war risk insurance was authorized by §19 of the Act of June 7, 1924 (43 Stat. 612, c. 320). It had been decided in a district court and was on appeal in this Court. At that stage the section was amended by the Act of March 4, 1925 (43 Stat. 1302-3, c. 553), so as to provide that in such cases "the circuit courts of appeal and the Court of Appeals of the District of Columbia shall respectively exercise appellate jurisdiction." Yet, it was held (p. 179) that the amendment did not include or affect the case pending in this Court.

(4) In his brief on the petition for certiorari (p. 8) respondent asserted that the application to pending causes of the Act of March 4, 1927, did not give the statute retroactive effect. No contention is made at this point with respect to the power of Congress to change the law governing the jurisdiction of the District Court for Porto Rico in such causes. The only concern at the moment is to ascertain what Congress designed to accomplish. Whether therefore the statute was retrospective depends upon the meaning of the word "retrospective." Fortunately, this Court has defined it.

In *Calder v. Bull*, 3 Dall. 386, 391, it was said :

"Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former, only, are prohibited. Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective."

So in *Poole v. Fleeper*, 11 Peters 185, 198, it was said :

"What is meant by a retrospective law? It is one which changes, or injuriously affects a present right; by going behind it, and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued."

Mr. Justice Story, in *Society, etc., v. Wheeler*, 2 Gall. 105, 139; 22 Fed. Cases No. 13,156, pages 756, 767, said :

"Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

Within this Court's own use of the word—by force of the very definition laid down—operation would obviously be retrospective if the statute were held to defeat further prosecution of suits in existence when it became law. In bringing their actions taxpayers were availing of rights assured them by existing law. The method by which they sought enforcement of those rights was then equally sanctioned by existing law. As elsewhere pointed out, they have lodged in court hundreds of thousands of dollars to await the outcome of the litigation. They are entitled to have that money back if the tax statutes be invalid. To say that attributing to the statute a purpose to destroy the suits and leave the taxpayers hanging helpless in the air would give it no retrospective effect would be absurd.

(5) Aside from the protection of the taxpayers arising from construing the statute in obedience to the prevailing presumption, there is nothing in the general situation, or in the apparent purpose, or in the language, to indicate an intention by Congress to apply it to cases

brought before the date of its enactment. Nor was anything said in Congress, during the consideration of the bill from which it resulted (*Congressional Record*, 69th Congress, 2nd Session, p. 5052), to reveal an expectation that such cases would be swept away by the measure.

In addition, perhaps it will be conceded, and indisputably it is true, that the word "maintain" is at least of ambiguous import. As applied to legal actions it may mean support, hold or continue; it may mean commence, institute or begin (*Boutiller v. The Steamboat Milwaukee*, 8 Minn. 97, 105; *Smith v. Lyon*, 44 Conn. 175, 178; *National M. Co. v. Dist. Ct.*, 34 Nev. 67, 77-8). To assign it the former significance here would include all previously brought suits within, and to assign it the latter significance would exclude them from, the prohibition of the statute. Adherence to the universally prevailing rule, which this Court has adopted, requires that the Act of March 4, 1927, be construed as inapplicable to pending cases.

(6) Lastly, numerous taxpayers, relying on the declaration by the Circuit Court of Appeals (*Camunas* case, 272 Fed. 924) in 1921, that the District Court of Porto Rico had jurisdiction to enjoin the collection of taxes under void Porto Rican statutes, brought the group of suits of which the cases at bar are examples and were agreed on by counsel as fairly testing whether the tax laws of 1923 and 1925 violate the free trade clause of the Organic Act. In most of them, in compliance with the requirement of the District Court (R. 106), large sums (equal to what the taxes would have been if the statutes imposing them were valid) have been deposited by the complainants in the registry of that court (R. 148-9). It is plain that it is at least doubtful whether it would ever be possible for the depositors to repossess themselves of—and it is certain that they are without legal right to get back into their own hands—these moneys, so as to pay them under protest to the Treasurer of Porto Rico in conformity with the terms prescribed by the tax refund statute (hereafter discussed) for suing therefor at law. Ac-

cordingly, if it were now held that the Act of March 4, 1927, destroyed the jurisdiction of the District Court for Porto Rico to entertain the present cases and they were abated or dismissed, so far as concerns the accumulated sums in court the taxpayers would, or might, be wholly remediless, even though the tax statutes were later found to be invalid.

If citizens were left without remedy in that way, it would deprive them of due process of law (*DeLima v. Bidwell*, 182 U. S. 199-0). Support of the same view is expressed in *Memphis v. United States*, 97 U. S. 293, 295-8; *Pritchard v. Norton*, 106 U. S. 124, 132; *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 291; *Ettor v. Tacoma*, 228 U. S. 148, 155-6; *Ochoa v. Hernandez*, 230 U. S. 139, 161; *Truax v. Corrigan*, 257 U. S. 312, 330. Avoidance of such a consequence, or the existence even of doubt about it, is an additional reason for construing the statute so as not to interfere with pending cases (*Carey v. South Dakota*, 250 U. S. 118, 122; *Lewellyn v. Frick*, 268 U. S. 238, 251-2).

The particular cases brought to this Court were selected prior to the passage of the Act of March 4, 1927. In event the records in their present shape be deemed not full enough concerning the deposits of tax moneys in the registry of the District Court or concerning the refusal of the Court of Appeals to permit supersedeas bonds to be substituted, leave is asked to suggest diminution so as to have sent up the pertinent proof on the subject.

## II.

*If the Act of March 4, 1927, had been in effect when the suits were commenced, it would not have deprived the District Court for Porto Rico of power to grant the relief sought.*

On the hypothesis upon which we are processing at the moment, viz.: that the assailed statutes are invalid and the remedy at law is inadequate, it is settled by *Hill v. Wallace*, 259 U. S. 44, 62, that in continental United States a Federal district court could enjoin collection of the taxes if the circumstances are "extraordinary and entirely exceptional."

To the same effect are *Dodge v. Brady*, 240 U. S. 122, 126; *Bailey v. George*, 259 U. S. 16, 20; *Frayser v. Russell*, 3 Hughes 227, 9 Fed. Cases No. 5,067, p. 728, C. C., E. D. Va., 1878; *Acklin v. Peoples' Sav. Assn.*, 293 Fed. 392, 394-5, D. C., S. D. Ohio, W. D., 1923; *Lafayette Worsted Co. v. Page*, 6 Fed. (2d) 399, 400, D. C., D. R. I., 1925.

The District Court of the United States for Porto Rico was established by the Organic Act of 1900, known as the Foraker Act (31 Stat. 85, c. 191, §34). Its jurisdiction was defined by the Organic Act of 1917, known as the Jones Act (39 Stat. 965, c. 145, §41; U. S. Code, Title 48, §863), to be the same as that of the district courts of the United States. It follows that (1) if new legislation has not imposed on the Federal court in Porto Rico a limitation different from that which exists with regard to a corresponding district court in continental United States and (2) if these cases come within the class dealt with in *Hill v. Wallace*, then the District Court for Porto Rico had jurisdiction to restrain collection of the taxes criticised.

(1) In its scope and effect §7 of the Act of March 4, 1927, is identical in Porto Rico with R. S. §3224 in continental United States.

§3224 (U. S. Code, Title 26, §154; 2 Mason, p. 1461; U. S. Comp. Stats. §5947; 3 Fed. Stat. Ann. (2d ed.), p. 1032) is as follows:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

This provision was enacted March 2, 1867 (14 Stat. 475, c. 169, §10), as an amendment to the Act of July 13, 1866 (14 Stat. 152, c. 184, §19; *Snyder v. Marks* 109 U. S. 189, 191-2). It constitutes part of the revenue laws of the United States. The Revised Statutes (2d ed., 1878) carry it in Chapter Two, entitled "Of Assessments and Collections", of Title XXXV, entitled "Internal Revenue." It is therefore

to be construed in conjunction with other portions of the internal revenue laws (*Miles v. Johnson*, 59 Fed. 38, 40, C. C., D. Ky., 1893).

The section relates only to taxes levied by Congress (*State Railroad Tax Cases*, 92 U. S. 575, 613). It does not apply to taxes laid by any governmental subdivision—for example, the District of Columbia—exercising merely a grant of power from Congress (*R. R. and Bridge Co. v. District of Columbia*, 1 Mackey 217, 234-5) and hence does not apply to Porto Rico (R. 137; *Porto Rico Tax Appeals*, *supra*, p. 549).

Furthermore, §9 of the Jones Act (39 Stat. 954, c. 145; U. S. Code, Title 48, §734), prescribing what "statutory laws of the United States" shall be in force in Porto Rico, expressly excepts "the internal-revenue laws." Thence R. S. §3224 is excluded from operation in the Island.

§7 of the Act of March 4, 1927, extends to Porto Rico, so far as concerns dealing by the Federal court there with taxes laid by the Insular laws, the exact limitation imposed by R. S. §3224 in continental United States. The phraseology of the two statutes expressing the prohibition is identical, viz.: that "no suit for the purpose of restraining the assessment or collection of any tax \* \* \* shall be maintained." In consequence, on this branch of our inquiry the question is the same as if it had arisen in continental United States with respect to a Federal tax.

If the present suits be such that R. S. §3224 would not constitute an obstacle to their success in continental United States,—that is, if they can be classed with *Hill v. Wallace*,—then the Act of March 4, 1927, if it had been in force when they were instituted, would have constituted no obstacle to their being maintained in Porto Rico. If R. S. §3224 would not deprive a district court of the United States of power to enjoin collection of the taxes here involved if laid by a law of the United States, then the Act of March 4, 1927, did not deprive the District Court of the United States for Porto Rico of that power.

(2) The present suits are of the same extraordinary and exceptional type as *Hill v. Wallace*.

Mere lapse of time consumed in fruitless litigation until the statute of limitations has barred a remedy at law is not enough (*Graham v. du Pont*, 262 U. S. 234, 256). For the determination, however, of what does constitute the kind of circumstances which are sufficient to remove a case from the ban of R. S. §3224 no exact test appears to have been announced. To ascertain whether those circumstances exist here therefore the method will be followed that was used in *Hill v. Wallace*; that is, an analysis will be made of the statutes.

The taxes covered by Nos. 211 and 212 were laid by Porto Rican Act No. 68 of July 28, 1923 (Laws of 1923, p. 442; as amended by Act No. 1 of August 27, 1923, Laws of 1923, Special Session, p. 2, and Act No. 6 of June 23, 1924, Laws of 1924, Special Session, p. 50), and those in No. 213, by Act No. 85 of August 20, 1925 (Laws of 1925, p. 584). At the time of the accrual of the taxes the law of Porto Rico, quoted in the bills (R. S. 65, 78), entitled a taxpayer to pay under protest and sue at law in an Insular court to recover the amount he claimed to have been wrongfully collected (Act No. 9 of June 23, 1924, Laws of 1924, Special Session, p. 80; as amended, in respects immaterial here, by Act No. 84 of August 20, 1925, p. 580).

The features of these laws (extracts from which are set out in an appendix) that, combined, make the circumstances "extraordinary and entirely exceptional" are as follows:

(a) The taxes are required to be paid by affixing and cancelling revenue stamps on the merchandise or on a document (1923 law, §§33, 37, 58; 1925 law, §75).

(b) For payment of the tax, as well as for payment of penalties for violation of the law or the regulations thereunder, a dealer must give bond in such amount as the Treasurer may require (1923 law, §53; 1925, §23).

(c) For non-payment of the tax, or for violation of any one of numerous detailed duties prescribed for taxpayers, criminal penalties, as well as summary methods of seizure of property, are provided (1923 law, §§35, 38-9, 44, 59, 74, 79, 85, 88; 1925 law, §§35, 49-52, 55, 57, 102-3).

(d) Summary detention of goods and arrests by executive officers are expressly sanctioned (1923 law, §§85, 86; 1925 law, §§55, 95).

(e) For each violation, determined by executive officials, of the statute or regulations a fine up to \$25 may be assessed (1923 law, §88).

(f) Criminal punishment of officers, irrespective of participation, is attached to violations by corporations (1923 law, §80; 1925 law, §60).

(g) The sole relief is a suit under the refund statute (R. 89). In order to avail of that the taxpayer must "attach to the said suit a receipt for the tax paid under protest" or a copy of it (§6). To get the receipt he must make the payment, protest against it, procure the collector to endorse the fact of payment and the amount protested, and join the collector in signing the endorsement (§1). A suit "to secure the return of the amount protested" must be brought "within a term of not to exceed thirty days from and after the date of payment" (§4).

Not alone, as said by the court below, would a multiplicity of suits be unavoidable if attempt were made to avail of the remedy prescribed by the refund statute; but, as said in *Hill v. Wallace*, to carry on such burdensome litigation would be impracticable. On its face it is manifest that caring for the requisite volume of law suits would prevent a tax payer from conducting any ordinary mercantile business successfully. In two of the bills (R. 10, 67, par. 6) it is alleged that the necessary number of cases to be brought by each complainant annually would be several thousand and in the third bill (R. 801) several hundred. If that be true of three taxpayers, this Court judicially knows that court calendars in Porto Rico would become so clogged by tax refund suits that delay in judicial proceedings would be tantamount to complete denial of justice.

In the next place, the requirements of paying the tax by affixing and cancelling a stamp and of obtaining a receipt are either repugnant or are physically impossible to comply with. In the nature of things a merchant must

either purchase stamps in quantity or must at the instant he handles each article of merchandise procure the requisite amount for making the payment thereon. If he bought in quantity he could not comply with the terms of the refund statute, because there would then be no basis of protest. If he waited until the moment when he could protest in conformity with the refund statute he would require a tax official continuously at his elbow in readiness at the uncertain and unascertainable time when every transaction occurred. In the course of ordinary business therefore a merchant could never perfect an action at law which would assure recovery of a void tax which he had paid.

Moreover, viewing the scheme of the tax statutes as a whole, it is clear that the legislature has created such a stranglehold by tax officials on taxpayers that the latter would be compelled to pay the invalid taxes without recourse in order to retain their property, keep out of jail or escape ruinous fines and prevent breaches of their bonds. What is proffered as an avenue of relief is but a sham, because hedged about with insuperable difficulties.

As was said in *Graham v. du Pont*, at page 257, of the taxes laid on Board of Trade members dealt with in *Hill v. Wallace*, so it may be said with slight alteration of verbiage with respect to the taxes which Porto Rico is seeking to impose on the numerous taxpayers engaged in the cases of which those at bar are a mere sample:

"To pay such a tax on each of the many thousands of transactions on the Board, and to sue to recover them back would have been utterly impracticable. It would have blocked the entire future grain business of the country and would have seriously injured not only the members of the Board but also the producing and consuming public."

It is urged therefore that the circumstances, lying on the face of the laws of Porto Rico, bring the instant cases within *Hill v. Wallace*.

Accordingly, it is concluded that the present cases are not moot. What R. S. §3224 does not require a court in continental United States to refrain from doing §7 of the Act of March 4, 1927, does not direct the District Court for Porto Rico to refrain from doing. As the present suits are of the same type that a district court of the United States would have entertained and in which it could have granted injunctions, the District Court for Porto Rico was empowered to take like action.

### III.

*The authorities relied on by respondent are inapplicable.*

It has been frequently held that pending cases were terminated by repeal of the statutes creating the jurisdiction in course of being exercised. Examination of the precise words involved, however, will disclose that they were so different from those now under discussion that the decisions shed no light on the present controversy. Moreover, in so far as such decisions handed down by courts inferior to this contain occasional forms of adverse expression, they are opposed to what this Court, in cases previously referred to, has firmly established to be the rules governing the relation of new statutes to old cases.

In *Re Hall*, 167 U. S. 38, the Act of February 13, 1895 (28 Stat. 664, c. 87), authorized the Court of Claims to adjudicate certain claims against the District of Columbia. By the Act of March 3, 1897 (29 Stat. 669, c. 387), the Act of 1895 was repealed and it was provided that "all proceedings pending shall be vacated and no judgment heretofore rendered in pursuance of said Act shall be paid." It was said (pp. 42, 43):

"The effect of the passage of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in those cases which were founded upon the act thus repealed. \* \* \* The repeal of the act took away all jurisdiction in the Court of Claims

to proceed further, so far as concerned any rights founded upon the act so repealed."

In *Hallowell v. Commons*, 239 U. S. 506, and *Parr v. Colfax*, 197 Fed. 302 (9 C. C. A., 1912), the matter involved was the transfer from the courts to an executive official of authority to deal with a particular question concerning wards of the nation. The Acts of August 15, 1894 (28 Stat. 305, c. 290), and February 6, 1901 (31 Stat. 760, c. 217), conferred on the circuit (later district) court of the United States jurisdiction to determine, and certify to the Secretary of the Interior, the heirship to an unpatented allotment held by an Indian who died intestate prior to the expiration of the period during which the land was in trust for him. By the Act of June 25, 1910 (36 Stat. 855, c. 431), it was provided that the Secretary of the Interior "shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive." It was said (239 U. S. 508) that the Act of 1910 made the jurisdiction of the Secretary of the Interior

"exclusive in terms, it made no exception for pending litigation, but purported to be universal and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States. . . . the reference of the matter to the Secretary . . . takes away no substantive right but simply changes the tribunal that is to hear the case."

In *United States v. McCrory*, 91 Fed. 295 (5 C. C. A., 1899), *Fairchild v. United States*, 91 Fed. 297 (C. C., D. N. J., 1899), and *United States v. Kelly*, 97 Fed. 460 (9 C. C. A., 1899), the Tucker Act of March 3, 1887 (24 Stat. 505, c. 359, §2), conferred on circuit and district courts of the United States jurisdiction, concurrent with the Court of Claims, to entertain suits by Government officers, within certain amounts, for recovery of their salaries. The Act of

June 27, 1898 (30 *Stat.* 495, c. 503, §2), by way of amendment added a clause as follows:

"The jurisdiction hereby conferred upon the said circuit and district courts shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof."

It was said or assumed in the three cases last mentioned that the amendment destroyed jurisdiction of circuit and district courts in pending suits by Government officers for the recovery of amounts claimed to be owing for salaries; that with the repeal of the statute vesting jurisdiction, and on which jurisdiction wholly depended, suits resting on the statute also fell. As matter of interpretation, the opposite result was reached in *Strong v. United States*, 93 Fed. 257 (C. C., Conn., 1899), and *United States v. Jacobus*, 96 Fed. 260 (2 C. C. A., 1899).

In *Federal Land Bank v. United States Nat. Bank*, 13 Fed. (2d) 36 (8 C. C. A., 1926), the jurisdiction of the district court was based solely on the land bank being incorporated under the laws of the United States. During the trial of the action the Act of February 13, 1925 (43 *Stat.* 941, c. 229, §12), was enacted providing that "no district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress." It was held (p. 38) that the jurisdiction of the district court was ousted by this provision.

Without going further into details, it is manifest that the phraseology of the statutes passed on in the cases relied on by respondent is so variant from the language of the statute under consideration in the present cases that the decisions cited by him do not support an interpretation of the Act of March 4, 1927, contrary to that urged by petitioners and do not even bear on the matter.

Here the provisions of the Judicial Code defining the powers of the District Court for Porto Rico remain in full force. There has been no attempt to amend them. The amendatory statute must be construed in conjunction with them. The situation therefore is completely distinguishable from one where there was plain purpose to alter the jurisdiction constituting the very life of the litigation concerned.

IV.

*The present cases are not moot and petitioners request opportunity to be heard on their merits.*

Dated, August 4, 1927.

Respectfully submitted,

FRANCIS G. CAFFEY,  
Counsel for Petitioners.

## APPENDIX.

## A.

*Extracts from Porto Rican tax statute of 1923.*

[Act No. 68 of July 28, 1923, Laws of 1923, p. 442; as amended by Act No. 1 of August 27, 1923, Laws of 1923, Special Session, p. 2.]

Section 20.—That there shall be levied, collected and paid, for one time only, as an internal revenue tax on each of the following articles: • • •

18. *Motor vehicles*.—On every motor vehicle, automobile, motorcycle, aeroplane, hydroplane, dirigible, side-car for motorcycles, motor for automobiles, bicycle, launch, auto-truck, chassis, auto-wagon, auto-tractor, parts and accessories for all of the aforesaid articles, solid or pneumatic tires, inner tubes therefor,—excluding tools, screws, tube-valves, spark-plugs and light bulbs, piston rings, felt washers, steel ball-bearings, lamp lenses, radiator rubber tubes, clamps therefor, vibrators and tire tube patches,—produced, manufactured, sold or used in Porto Rico, a tax of ten (10) per cent *ad valorem*.

Section 33.—The tax hereby prescribed on articles for sale, use, consumption or exhibition in Porto Rico, except as provided in section 29 of this Act, shall be levied as soon as they are on the market in possession of a dealer or commission merchant or the representative thereof in this island, who shall be responsible for the payment of said taxes upon transferring said articles to another dealer or consumer, or *upon acquiring them or having them in his possession*, and who shall pay such taxes *in one of the two following forms in accordance with such regulations as the Treasurer of Porto Rico may prescribe for the purpose*: (a) Upon acquiring the taxable articles and having them in his possession, by making entries of receipt and delivery in the stock and receipt and delivery book, and by simultaneously paying the tax by cancelling the corresponding stamps on

an internal revenue invoice; or (b) as he disposes of the taxable articles. . . .

Section 35.— . . . From and after the date on which this Act take effect, every person, who by himself or through his agents or representatives, acquires taxable articles for sale or transfer to another merchant or consumer, and on which the taxes specified by this Act have not been paid, shall keep in his commercial establishment, from which it shall not be removed, except by authorization of the Treasurer of Porto Rico, an official book wherein entries shall be made of all taxable articles at the time they are acquired, and the corresponding entry at time of selling or otherwise disposing of them, and, further, furnish all other information that the Treasurer of Porto Rico may by regulation prescribe for the purpose of determining the value and other circumstances in connection with such articles; . . .

Section 37.—That all taxes provided for in this Act shall be paid by affixing and cancelling internal revenue stamps on such documents and articles, as for such purpose the Treasurer of Porto Rico may prescribe. Such stamps shall be furnished by the Treasurer of Porto Rico, on requisition, to collectors, in such quantities as may be necessary for local needs.

Section 38.—That every person who fails to pay the taxes herein prescribed, at such time and in such manner as this Act provides, except as otherwise herein determined, shall be guilty of misdemeanor, and the merchandise on which said tax has not been paid may be attached by the Treasurer of Porto Rico or by his agents and by him sold at public auction to indemnify The People of Porto Rico for the sums defrauded by the violator.

Section 39.—That every person who shall have in his possession or has on any premises under his control, any merchandise subject to tax under the provisions of this Act, on which such tax has not been paid, except such as are duly entered in the official book of a licensed manufacturer, or of a dealer, shall be guilty of misdemeanor, and the merchandise may be seized by the Treasurer of Porto Rico or by his

agents, and by him sold at public auction to indemnify The People of Porto Rico for the amounts defrauded by the violator, and the license of such person, if a merchant, may be revoked.

Section 44.—That it shall be the duty of every merchant, agent or other person possessing in Porto Rico any merchandise taxable under the provisions of this Act, to produce upon demand of any duly authorized internal revenue officer, true and authentic invoices covering such merchandise. Any merchant, agent or other person who makes or causes payment to be made of any tax not in accordance with the true value of the merchandise subject to tax under the provisions of this Act, shall be guilty of misdemeanor, and the Treasurer of Porto Rico may attach and sell at public auction the merchandise on which the full amount of the tax has not been paid, to indemnify The People of Porto Rico for the amounts defrauded by the violator.

Section 53.—• • • Every dealer having taxable articles in his possession upon which taxes have not been paid, shall provide a bond for the amount that the Treasurer of Porto Rico may require. The amount of this bond shall be fixed according to volume of business done. Said bond shall be liable for such taxes and fines as may be imposed on said manufacturers for violations of any of the provisions of this Act or of the regulations, • • •

Section 58.—That all merchandise acquired or manufactured during a natural day, and the corresponding internal revenue stamps, shall be entered in the stock book at the precise moment of receipt or completion of said merchandise, if the nature of the article permits, or at the termination of the natural working day in other cases. There shall further be entered in said book each sale or shipment made during said day, including the name and address of the buyer or receiver when referring to manufacturer, and the stamps cancelled, said entry to be made before removing the merchandise from the factory or premises, and such other information as the Treasurer of Porto Rico may by regulation prescribe. • • • In the invoice books the payment of

tax shall be made by affixing and cancelling internal-revenue stamps, in such cases as may be necessary in accordance with the regulations prescribed by the Treasurer of Porto Rico.

Section 59.—That the commercial invoice and stock-books shall at all times be accessible to inspection by internal-revenue officers. Every person who fails to comply with any of the provisions of this Act regarding the aforesaid books, shall be guilty of misdemeanor, and the unregistered product shall be seized by the Treasurer of Porto Rico or by his agents, and by him sold for the benefit of The People of Porto Rico.

Section 74.—That when no other penalty is specifically provided, every person who violates or fails to observe any of the provisions of this Act or of any act relating to internal revenues, or of such regulations, as may be promulgated by virtue thereof, and every person who knowingly aids, abets, or otherwise assists another in violating or failing to observe any of the provisions of this Act or of any other act or regulation relating to the revenues of Porto Rico, shall be guilty of misdemeanor.

Section 79.—That whenever this Act provides that the commission of certain acts constitutes a misdemeanor and no penalty is specifically prescribed, the accused shall be sentenced to a fine of from fifty (50) to five hundred (500) dollars, or to confinement in jail for a maximum term of one year, and for the second and each subsequent offense both penalties, fine and imprisonment, shall be imposed.

Section 80.—That whenever a violation of any of the provisions of this Act is committed by a corporation, the warrant of arrest shall be issued for and served upon the president, manager, administrator or other officer of the corporation designated by the court and said officer, upon conviction of the corporation, shall be liable to and shall suffer such penalty as this Act establishes for such violation.

Section 85.—That any duly authorized internal-revenue agent, collector or officer may detail and examine any cask, bundle, package or box of any description containing or

supposed to contain taxable articles whenever such officer shall have reason to believe that the tax imposed by law thereon has not been paid, or that said bundle is being removed in violation of law, and he may further hold such casks, bundles, packages or boxes until it shall have been determined whether the property so detained is subject to taxation under the law.

Section 86.—That the Chief of the Bureau of Excise Taxes or his assistant and all internal revenue agents are hereby authorized to arrest any offender caught in the act of committing a violation of the revenue laws or regulations, and immediately to conduct such offender before the municipal or other competent judge for the preparation of summary or other preliminary proceedings in the case, and the accused shall remain under arrest during such preparation and preliminary proceedings; and should the existence of good and sufficient proof of the imputed violation of the law be shown in the course of this investigation, said commitment shall continue until the case shall have been decided by a court having jurisdiction thereof. The summary proceedings and the final trial of the case shall be held without unnecessary delay. If the guilt of the accused is not conclusively established by the summary proceedings he shall be immediately set at liberty. During all the time of the prosecution of the summary proceedings or thereafter until such time as a final decision shall have been reached in the case the accused shall be allowed to furnish bail the amount of which shall not exceed the maximum of the penalty which, in accordance with law, attaches to the violation of which he is accused, the number of days of imprisonment computed at the rate of three (3) dollars a day to be added to the amount of the fine; but no person against whom conclusive evidence of guilt is adduced at such summary proceedings shall be set free until such time as the amount and the form of the bond and the sufficiency of the sureties thereon shall have been approved. In all cases where complaint is filed in a competent court against an accused person for violating the provisions of this Act or the regulations there-

of, before proceeding to try the case the judges shall submit the proceedings to the Treasurer of Porto Rico, through the office of the Attorney General, for the purpose of giving the accused an opportunity of being tried administratively should said procedure be proper in the judgment of the Treasurer.

Section 88.—That the Treasurer of Porto Rico is hereby authorized to impose and collect, through administrative proceedings, from any person failing to observe any of said regulations, and in cases of less serious violations of this Act, a fine not to exceed twenty five (25) dollars for each violation, or he may in his discretion file a complaint in the proper court against such person for offenses against the regulations or violations of the law. Any person so complained against before a court for any violation of this Act or of the regulations, upon conviction, shall be punished by fine or imprisonment, or by both penalties, in accordance with the specific provisions hereof. Whenever the Treasurer of Porto Rico imposes an administrative fine as hereinbefore provided and payment thereof is not made, said officer may institute proceedings in the proper court for violation of the provisions of law or of the regulations under which such fine is imposed, and upon conviction, the person committing such violation shall be punished according to the provisions of this Act as if the proceedings had been originally instituted in the proper court.

### B.

*Extracts from Porto Rican tax statute of 1925.*

[Act No. 85 of August 20, 1925, Laws of 1925, p. 584.]

Section 16.—There shall be collected and paid once only, an internal revenue tax on each of the following articles: • • •

15. *Motor Vehicles*.—On every motor vehicle such as automobiles, trucks, tractors, autocars and trailers, by whatever name known; on chassis, motors, bodies, inner tubes and solid or pneumatic tires for such vehicles; on motor-cycles and launches, with or without mounted motors; on motors for the same, and on solid or pneumatic tires for

motorcycles, sold, transferred, used or consumed in Porto Rico, a tax of seven (7) per cent *ad valorem*.

Section 23.— \* \* \* Every dealer having taxable articles in his possession upon which taxes have not been paid, shall furnish a bond in favor of The People of Porto Rico in such amount as the Treasurer of Porto Rico may require. The amount of this bond shall be fixed according to the volume of the business done. Said bond shall be liable for all taxes and fines that may be imposed upon him for violation of any of the provisions of this Act or of the regulations; \* \* \*

Section 35.—That all excise taxes provided for in this Act shall be paid by affixing and cancelling internal revenue stamps on such documents and articles, as for such purpose the Treasurer of Porto Rico may prescribe. Such stamps shall be furnished by the Treasurer of Porto Rico to collectors of internal revenue in such quantities as may be necessary for local needs; \* \* \*

Section 49.—Any person who, for the purpose of payment of the taxes prescribed by this Act, shall for any reason declare smaller quantities than those produced, manufactured, obtained or deducted, shall be guilty of a misdemeanor.

Section 50.—Any person who shall sell, transfer, use or consume any article subject to taxation under this Act, without paying the said tax at the time and in the manner herein provided, shall be guilty of a misdemeanor.

Section 51.—Any person who deals in, handles, has in store, or shall have had merchandise taxable under this Act, and refuses to furnish or prevents the furnishing of documents or reports in connection therewith to the Treasurer of Porto Rico or to his agents, when required by them, shall be guilty of a misdemeanor.

Section 52.—Any person who sells or disposes of taxable articles or removes them from a factory without having paid the tax thereon in the manner specified in the preceding section, except as the Treasurer of Porto Rico may by regulation prescribe, shall be guilty of a misdemeanor.

**Section 55.**—The absence of the proper internal revenue stamp on any box or package of cigars, cigarettes or any other article on which the law or the regulations require the affixing of internal revenue stamps as evidence of the payment of the tax, shall constitute *prima facie* evidence of the non payment of the tax, and all articles lacking the proper internal revenue stamps shall be seized by the Treasurer of Porto Rico or by his agents, and by him sold for the benefit of The People of Porto Rico.

**Section 57.**—Any person who violates or fails to comply with any of the provisions of this Act, or with any law relative to internal revenue, or with any provision of such regulations as may be promulgated thereunder; and any person who knowingly aids, abets or otherwise helps another to violate this Act, or to fail to comply with any of its provisions or with any other law or regulation thereunder relative to the internal revenue of Porto Rico, where no other penalty is specifically provided, shall be guilty of a misdemeanor.

**Section 60.**—Whenever a violation of any of the provisions of this Act is committed by a corporation, the warrant of arrest shall be issued for and served upon the president, manager, administrator or other officer of the corporation designated by the court as liable under the law, and said officer, upon conviction of the corporation, shall be liable to and shall suffer such penalty as this Act establishes for such violation.

**Section 95.**—The Chief of the Bureau of Excise Taxes, the Assistant Chief and the General Collector of Internal Revenues of the said bureau and all agents and collectors of internal revenue are hereby authorized to take oaths, certify declarations, inspect stocks of merchandise of manufacturers or dealers in order to ascertain the amount of his stock in connection with this Act, and to arrest any offender caught in the act of committing a violation of the revenue laws or regulations, and immediately to conduct such offender before the municipal or other competent judge for the preparation of summary or other preliminary proceedings in

the case, and the accused shall remain under arrest during such preparation and preliminary proceedings; and should the assistance of good and sufficient proof of the imputed violation of the law be shown in the course of this investigation, said commitment shall continue until the case shall have been decided by a court having jurisdiction thereof. The summary proceedings and the final trial of the case shall be held without unnecessary delay. If the guilt of the accused is not conclusively established by the summary proceedings, he shall be immediately set at liberty. During all the time of the prosecution of the summary proceedings or thereafter until such time as a final decision shall have been reached in the case, the accused shall be allowed to furnish bail, the amount of which shall not exceed the maximum of the penalty which, in accordance with law, attaches to the violation of which he is accused, the number of days of imprisonment computed at the rate of three (3) dollars a day to be added to the amount of the fine; but no person against whom conclusive evidence of guilt is adduced at such summary proceedings shall be set free until such time as the amount and form of the bond and the sufficiency of the sureties thereon shall have been approved. In all cases where complaint is filed in a competent court against an accused person for violating the provisions of this Act or the regulations thereof, before proceeding to try the case, the judges shall submit the summary proceedings to the Treasurer of Porto Rico, through the office of the Attorney General, for the purpose of giving the accused an opportunity of being tried administratively should said procedure be proper in the judgment of the Treasurer.

Section 102.—When no other penalty is specifically provided, every person who violates or fails to observe any of the provisions of this Act or of such regulations as may be promulgated by virtue hereof, and every person who knowingly aids, abets, or otherwise assists another in violating or in failing to observe any of the provisions of this Act or of any other act or regulation relating to the revenues of Porto Rico, shall be guilty of a misdemeanor.

Section 103.—Whenever this Act provides that the commission of certain acts constitutes a misdemeanor and no penalty is specifically prescribed the accused shall be sentenced to a fine of not less than one hundred (100) nor more than one thousand (1,000) dollars or to confinement in jail for a term of not less than thirty (30) days or more than one year, and for the second and each subsequent offense, both penalties, fine and imprisonment, shall be imposed.



SEP 24 1927

CHARLES ELMORE CROPLEY  
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1927

No. 214

ADOLFO VALDES, PIO PEREZ, LUIS C. CUYAR,  
*et al., etc.,*

*Petitioners,*

*vs.*

JUAN G. GALLARDO,  
*Treasurer of Porto Rico.*

No. 215

FINLAY, WAYMOUTH & LEE, INC.,

*Petitioners,*

*vs.*

JUAN G. GALLARDO,  
*Treasurer of Porto Rico.*

No. 216

ANGEL ABARCA PORTILLA, RAFAEL ABARCA  
PORTILLA, ENRIQUE ABARCA SANFELIZ,  
*et al., etc.,*

*Petitioners,*

*vs.*

JUAN G. GALLARDO,  
*Treasurer of Porto Rico.*

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIRST CIRCUIT.

## BRIEF FOR PETITIONERS

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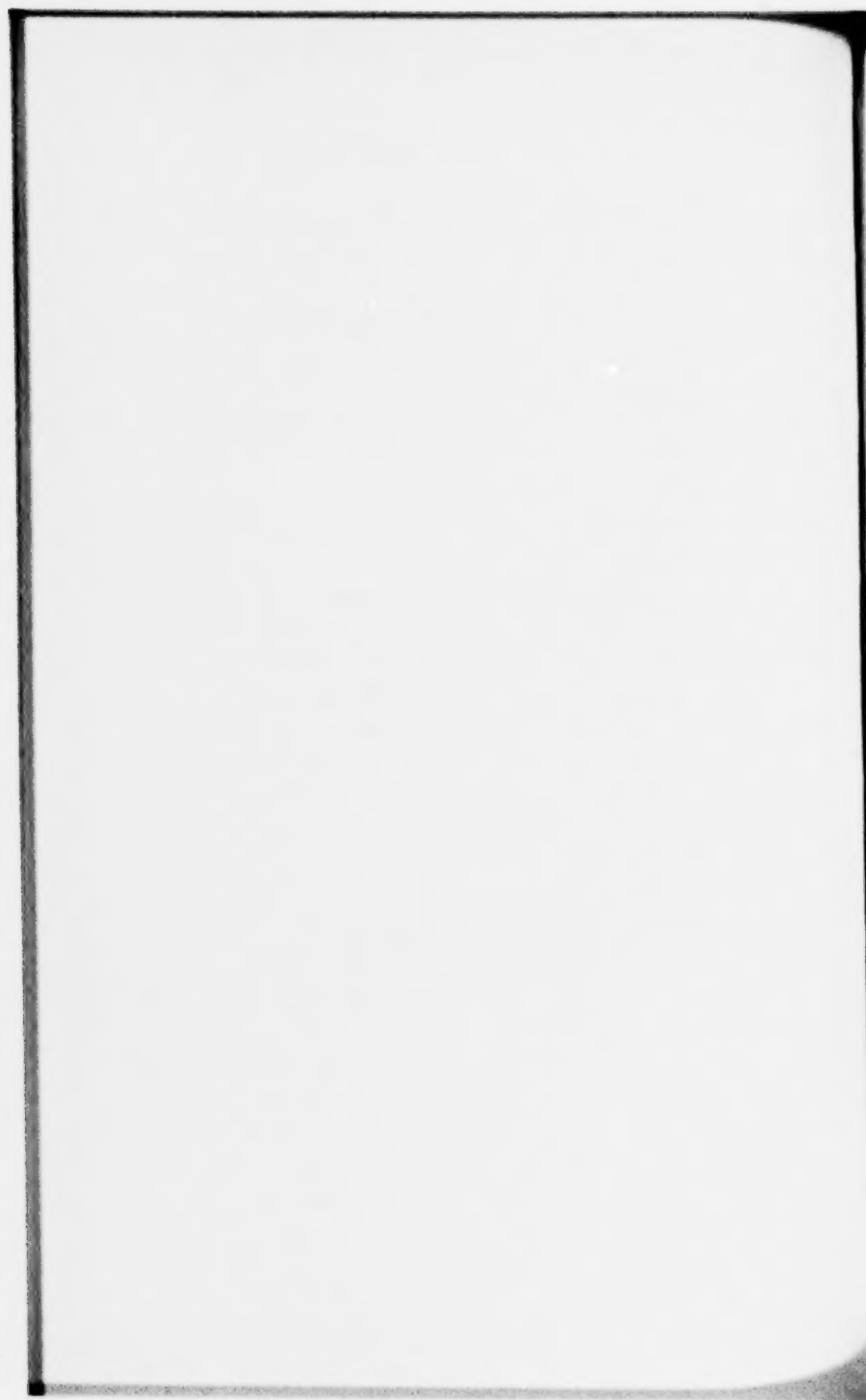
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# Supreme Court of the United States,

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CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE FIRST CIRCUIT.

## BRIEF FOR PETITIONERS.

The order granting the writs of certiorari herein directs  
that the cases be set down for argument

"on the sole question whether they have become moot by virtue of the Act of March 4, 1927, amending section 48 of the Organic Act of Porto Rico."

This brief consequently is confined to that question and does not discuss the merits.

The opinions of the court below are reported as *Porto Rico Tax Appeals*, 16 Fed. 2d, 545; but as they were delivered before the Act of March 4, 1927, was passed, they of course do not discuss the question now to be argued.

The cases originated as bills in equity in the District Court of the United States for Porto Rico to enjoin respondent from enforcing an act of the legislature of Porto Rico which imposed certain *excise* and *sales* taxes.\*

The chronology of the cases is important.

The bills were filed in October and November, 1925 (R. 1, 70, 88). They were dismissed by the District Court in January, 1926 (R. 62, 80, 104). Appeals to the Circuit Court of Appeals were taken during the same month (R. 64, 81, 111, 112). The transcripts of record were filed in the Circuit Court of Appeals in February, 1926 (R. 1, 70, 88). The appeals were argued April 27, 28, 1926 (R. 139). Decrees of affirmance, upon the ground that there was an adequate remedy at law by paying the taxes under protest and then suing at law for their recovery, were entered on September 25, 1926 (R. 118, 124, 139). A petition for rehearing, filed October 14, 1926, called attention to the fact that the bills had been filed in reliance upon a previous decision of the same court (*Camunas Case*, 272 Fed. 924) holding the remedy at law inadequate and that by such

\*Act No. 85 of August 28, 1925, approved by the Governor of Porto Rico on that day and entitled "An Act to Provide Revenue for the People of Porto Rico by Levying Certain Sale Taxes and Taxes for the Manufacture, Use, Sale and Consumption of Certain Products, and by the Levying of Certain Excise and License Taxes on Certain Occupations, Industries or Businesses, To Impose Certain Penalties, To Repeal the Laws in Force Providing for Excise and License Taxes and for Other Purposes."

reliance plaintiffs possibly had lost whatever legal remedy they may have had (R. 124-136, particularly 134, 135). Reargument was ordered November 4, 1926, and reargument was had November 30 and December 1, 1926 (R. 139). Upon the reargument the ruling as to the adequacy of the remedy at law was reversed, the legal remedy was declared inadequate, the validity of the tax statute was considered upon its merits, and it was partly sustained and held partly invalid (R. 136-138). That decision was rendered January 7, 1927 (R. 140, 141). Motions to stay the mandates pending determination by this court of a petition for certiorari were made and granted January 28, 1927 (R. 141, 142).

Congress then passed the Act of March 4, 1927, Section 7 of which amended Section 48 of the Organic Act of Porto Rico by adding thereto the following (44 Stat. 1418, c. 503, § 7; U. S. Code, Title 48, Sec. 872, Pamphlet Supplement No. 3, April, 1927, p. 92):

"No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

Whether or not that statute renders these cases moot and prevents a review of them by this court is the question now presented.

## POINT I.

**The new statute is inapplicable to pending cases.**

1. This precise point, with reference to this very statute, has been specifically decided by the Circuit Court of Appeals for the First Circuit.

The case of *Gallardo v. Porto Rico Ry. L. & P. Co.*, 18

Fed. (2d) 918, was brought in the District Court of the United States for Porto Rico and was pending in the Circuit Court of Appeals at the time the Act of March 4, 1927 was passed. A motion was then made in the Circuit Court of Appeals to dismiss that case (and several others similarly situated) upon the ground that further prosecution of the cases was prevented by the Act of March 4, 1927. In denying that motion the Circuit Court of Appeals said (18 Fed. (2d) at p. 925):

"It is contended that this act destroys the jurisdiction otherwise inherent in the court below and in this court. We are unable to adopt that view. The interpretation of this act falls under the general rule recently stated by the Supreme Court in *Fullerton v. Northern Pacific R. Co.*, 266 U. S. 435, 437, 45 S. Ct. 143, 144 (69 L. Ed. 367), as follows:

"It is a rule of construction that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect"—citing *Harvey v. Tyler*, 2 Wall. 328, 347, 17 L. Ed. 871; *Sohn v. Waterson*, 17 Wall. 596, 599, 21 L. Ed. 737; *Twenty Per Cent. Cases*, 20 Wall. 179, 187, 22 L. Ed. 339; *Chew Heong v. United States*, 112 U. S. 536, 559, 5 S. Ct. 255, 28 L. Ed. 770; *Schwab v. Doyle*, 258 U. S. 529, 534, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454; *Hopkins v. Lincoln Trust Co.*, 233 N. Y. 213, 135 N. E. 267.

*We see nothing in this amendment indicating that Congress intended to apply it to pending cases. Nor do we think that the word 'maintained' is to be construed to cover actions already instituted. Similar language has been held inapplicable to pending suits. Moon v. Durden*, 2 W. H. & G. (Exch.) 21 (1848); *Knight v. Lee* (1893) 1 L. R. 1, Q. B. D. 41; *Burlbank v. Inhabitants of Auburn* (1850) 31 Me. 590; *Gumpper v. Waterbury Traction Co.* (1896) 68 Conn. 424, 36 A. 806; *Smith v. Lyon* (1876) 44 Conn. 175."

2. Similar decisions repeatedly have been made with reference to similar statutes.

In *Moon v. Durdan*, 2 Exch. 22 (1848), a statute which provided that "no suit shall be *brought or maintained* in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager" was held inapplicable to cases pending at the time of the enactment of the statute. ALDERSON, B., said (p. 41):

"If it had been stated 'that no action shall be brought,' or only '*that no action shall be maintained*,' it seems to me clear that we should have considered the words 'brought' and 'maintained' as synonymous, and as prohibiting the success of future suits alone. And although the use of both in one sentence makes this *less obvious*, yet, when we consider that to give the more strict interpretation to the word 'maintained' will compel us to suppose, without further evidence, that the legislature contemplated so gross an act of injustice as, without compensation, to take away an existing right of action already pending, and that, too with no provision even for the costs incurred in the enforcing of what was, before the act, a legal right, I am not disposed to put such a construction on the word, but to treat it, as I think the legislature intended it, as a redundant expression only."

That case was cited and followed in *Grasso v. Holbrook &c. Co.*, 102 N. Y. App. Div. 49, 52.

*Knight v. Lee*, 1 Q. B. 41 (1893), is to the same effect.

In *Burbank v. Inhabitants of Auburn*, 31 Me. 590, a statute providing that "no action shall hereafter be maintained against any city," &c., was held inapplicable to pending cases, the word "maintained" being considered to have the import of *brought*.

A similar decision was made in *Smith v. Lyon*, 44 Conn. 175, 178, in which the court said:

"Nor are we willing to overthrow a rule so firmly founded in justice upon the plaintiff's suggestion as to the word 'maintained'; for we do not think that, as used in the act, it in itself imports retroactive intent on the part of the legislature. A critical analysis of it would doubtless disclose the idea of continuing a life already commenced; *but men both in and out of the profession often speak of maintaining an action, having reference to one yet to be instituted.*"

So, too, in *Creditors' Adjustment Co. v. Rossi*, 26 Cal. App. 725, a prohibition against the maintenance of an action was held not to apply to cases brought before the enactment of the prohibition. The court said:

"The word 'maintain' as here used means to commence, institute, begin, or bring."

3. The decision of this court in *United States vs. St. Louis, San Francisco & Texas Ry. Co.*, 270 U. S. 1, is practically conclusive in showing that the statute here involved does not apply to pending cases.

It was there held that a statute providing that "all actions at law" by carriers for the recovery of their charges should be begun within three years from the time the cause of action accrued, was not applicable to cases brought upon causes of action which accrued prior to the enactment of the statute. It was held, also, that a further statute enacting that the provisions of the prior one should "extend to and embrace" cases in which the cause of action had theretofore accrued, *was not applicable to suits already brought.* The court said (page 4):

"It is not to be assumed that Congress intended by that amendment to defeat claims on which suits duly brought were then pending, or on which, as in the cases at bar, judgment had already been entered below."

It is to be observed that the two statutes there involved, when read together, provided, in substance, that "all actions" of the nature specified in the statute should be begun within three years whether the cause of action had or had not accrued; and yet, notwithstanding the generality of the phrase "all actions" the court held that pending actions should be excluded.

It is impossible, we think, to distinguish that case from those at bar, and from the decision there made it necessarily follows that these cases are not affected by the statute which respondent invokes.

4. Furthermore, U. S. Rev. Stat. Sec. 13 (U. S. Code, Title 1, Sec. 29), is in the nature of a saving clause, if one be needed, preventing the application of the amendment to pending cases. That section provides:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute *shall be treated as still remaining in force* for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

That section, it has been decided, is not confined to penal statutes, and has been upheld and enforced "as a rule of construction applicable, when not otherwise provided, as a general saving clause to be read and construed as a part of all subsequent repealing statutes." (*Hertz v. Woodman*, 218 U. S. 205, 217, 218.)

If respondent were liable to an injunction under the law as it stood prior to March 4, 1927, the then-existing law is to be treated "as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability".

## POINT II.

**To construe the statute as applicable to cases brought prior to its enactment would violate the rule that all statutes are to be considered as prospective only.**

The rule that statutes are not to be given retroactive effect is well settled.

"That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of *general application*. *It has been applied by this Court to statutes governing procedure* \* \* \*."

*United States v. St. Louis, etc. Ry. Co.*, 270 U. S. 1, 3.

"It is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

*Fullerton Co. v. Northern Pacific Ry. Co.*, 266 U. S. 435, 437.

"There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, *and it ought never to receive such a construction if it is susceptible of any other*. It ought not to receive such a construction unless the words used are so clear, strong and imperative that *no other meaning can be annexed to them* or unless the intention of the legislature cannot be otherwise satisfied."

*U. S. Fidelity Co. v. Struthers Wells Co.*, 209 U. S. 306, 314.

"Courts of justice agree that *no statute, however positive in its terms*, is to be construed as designed to interfere with existing contracts, *rights of actions*, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes *only to future cases*, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. *Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise*, unless the language employed expresses a contrary intention in unequivocal terms."

*Twenty Per Cent. Cases*, 20 Wall. 179, 187.

Indeed, the existence of that rule, *and that the statute here under consideration is not to be construed as retroactive*, seem to be expressly admitted by the respondent; for in his brief in opposition to the petition in Nos. 211, 212, 213, the respondent said:

"We are thoroughly in accord with counsel for the petitioners on the elementary doctrine as to the present and prospective effect in general of statutes.

*We have never believed or asserted that the Act of March 4, 1927, is retroactive.* Indeed, we do not see how that act does or could have any retroactive effect."

Respondent's position seems to be that to apply the statute to pending cases *would not be giving it a retroactive effect*. That, we submit, is untenable and unsound, and, indeed, utterly absurd.

Petitioners had a right to sue in equity to enjoin the enforcement of the Tax Act as the law existed when they brought their suits. That, at least, is their contention and the result of the decision below in these cases. It is true that respondent denies that that was the existing law, but the court below has ruled against him on that point; and the question whether these cases have become moot "*by virtue of the Act of March 4, 1927,*" necessarily must be determined upon the assumption that the previously existing law authorizes the issuance of injunctions.

The fact that respondent claims that the Act of March 4, 1927, has rendered these cases moot is the clearest sort of demonstration that he is attempting to give to the new statute a retroactive effect, *i. e.*, he asserts that the new statute deprives petitioners of a remedy which the old law gave them. If that were not so he would be resisting the cases upon the basis of the old law instead of invoking the aid of the new law.

A law which stops the prosecution of a suit which the old law gave a right to prosecute certainly is retroactive; and to give that effect to a new law is to give it a retroactive effect.

*U. S. Fidelity Co. v. Struthers Wells Co.*, 209 U. S. 306, 316.

Furthermore, it is to be remembered that in two of these cases (Nos. 214 and 215, which were Nos. 1944 and 1949 in the court below) it has been decided that petitioners *are entitled to injunctions against the collection of taxes on sales in the original packages by the importers of foreign goods, and are entitled to repayment of the impounded proceeds of such taxes* (R. 138, 140). Consequently, to sustain respondent's contention that the new act prevents the issuance of such injunction by the District Court pursuant to the mandate of the Circuit Court of Appeals (which con-

tention is clearly made at pages 8 and 9 of his brief in opposition to the petition in Nos. 211, 212 and 213) would amount to giving to the Act of March 4, 1927, not only a retroactive effect, but the effect of vacating and annulling a judgment duly rendered by a competent court before the statute was enacted. Certainly that is retroactiveness with a vengeance.

In short, respondent's assertion that to construe the statute as rendering these cases moot is not to give to them a retroactive effect is manifestly absurd.

### POINT III.

**Even if the new statute be applicable to cases pending in the District Court, it certainly does not affect cases already determined in the District Court or affect the jurisdiction of this court to review decrees previously made by the Circuit Court of Appeals.**

The new statute does *not* amend Section 41 of the Organic Act, which is the section that prescribes the jurisdiction of the District Court (39 Stat. 965; U. S. Code, Tit. 48, § 863). It does not amend Section 128 of the Judicial Code (U. S. Code, Title 28, Sec. 225), giving the Circuit Court of Appeals appellate jurisdiction to review final decisions of the District Court for Porto Rico. Neither does it amend Section 240 of the Judicial Code (U. S. Code, Title 28, Sec. 347), giving this court jurisdiction to review decisions of the Circuit Court of Appeals. *The appellate jurisdiction there prescribed remains unchanged.*

While an appeal, unlike a writ of error, may not be technically the institution of a new suit, the perfecting of the appeal transfers the case from the trial court to the

appellate court (*Keyser v. Farr*, 105 U. S. 265; *Morrin v. Lawler*, 91 Fed. 693).

*Consequently, the prosecution of an appeal or writ of certiorari cannot be regarded as the maintenance of a suit in the trial court.*

Neither appeals nor writs of error ordinarily are regarded as within the purview of statutes affecting "actions" or "suits."

3 *Corpus Juris*, pp. 305, 330.

In short, therefore, a statute which prohibits the maintenance of a certain class of suits in the District Court of the United States for Porto Rico does not prohibit the prosecution of appeals or of writs of certiorari in this court.

Neither does such a statute prohibit the District Court from giving effect to a judgment or decree of the Circuit Court of Appeals or of this court.

In *White v. United States*, 270 U. S. 175, the appeal to this court was taken in August, 1924, and on March 4, 1925, an act was passed giving appellate jurisdiction over cases of the kind there involved to the Circuit Court of Appeals instead of this court. Nevertheless, this court retained jurisdiction and heard and decided the case in 1926. The court said (p. 179):

"Mrs. White appealed to this court in August, 1924, and it fairly may be assumed that the Act of March 4, 1925, c. 553; 43 Stat. 1302, 1303, giving the appellate jurisdiction to the Circuit Court of Appeals does not apply."

It is interesting to note that in that case the United States conceded that the Act of March 4, 1925, was *prospective only and did not affect pending cases* (See abstract of Government's brief in that case at p. 177).

**POINT IV.**

**These cases come within the doctrine of *Hill v. Wallace*, 259 U. S. 44, and hence the Act of March 4, 1927, does not prevent their maintenance even if that statute be construed as applicable to suits brought prior to its enactment.**

The Act of March 4, 1927, is identical in substance and effect with U. S. Rev. Stat. Sec. 3224 (U. S. Code, Title 26, sec. 154), which reads as follows:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

That is to say, the Act of March 4, 1927, prevents the maintenance of suits to enjoin the assessment or collection of taxes imposed by the laws of Porto Rico under the same circumstances, *and under the same circumstances only*, as U. S. Rev. Stat. Sec. 3224 prevents the maintenance of such suits with respect to taxes imposed by the laws of the United States. If Sec. 3224 would not prevent the maintenance of these suits if the taxes involved were imposed by the United States, then the Act of March 4, 1927, does not prevent their maintenance even if construed as applicable to pending cases.

If, then, these taxes had been imposed by the United States, would Sec. 3224 prevent the maintenance of these suits? We submit not.

In *Hill v. Wallace*, 259 U. S. 44, the suit was against the Secretary of Agriculture, the Collector and Commissioner of Internal Revenue, and the United States District Attorney, and prayed for an injunction restraining the collection of a tax imposed by Congress upon certain contracts for the sale of grain. Section 3224 was specially set up and in-

voked (p. 49) and yet the injunction against the Collector and District Attorney was granted (p. 72). With respect to Section 3224 this court said (p. 62):

"A further question arises as to whether this is a suit for an injunction against the collection of the tax in violation of § 3224, Rev. Stats., in so far as it seeks relief against the District Attorney and Collector of Internal Revenue. Were this a state act, injunction would certainly issue against such officers under the decisions in *Ex parte Young*, 209 U. S. 123; *Ohio Tar Cases*, 232 U. S. 576, 587; *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 82. Does § 3224, Rev. Stats., prevent the application of similar principles to a federal taxing act? It has been held by this court, in *Dodge v. Brady*, 240 U. S. 122, 126, that § 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also *Dodge v. Osborn*, 240 U. S. 118, 122. In the case before us, a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market in order to test the validity of the act would stop its 1600 members in a branch of their business most important to themselves and to the country. We think these exceptional and extraordinary circumstances with respect to the operation of this act make § 3224 inapplicable."

The cases at bar, we submit, fall clearly within that doctrine.

We have here a tax on *sales*, just as in *Hill v. Wallace*, with the additional element that the tax is not confined to sales of any one kind of merchandise but applies to all "articles the object of commerce" except some which are specifically exempted. The rate of the tax varies on different articles (See Sections 16 and 62 quoted in appendix). Any person who sells any article subject to the tax without paying the tax is guilty of a misdemeanor (Secs. 50, 79), the penalty for which is a fine of not less than \$100 nor more than \$1000 or confinement in jail for not less than 30 days nor more than one year, and for the "second and each subsequent offense, both penalties, fine and imprisonment, shall be imposed" (Sec. 103). Thus here, as in *Hill v. Wallace*, a sale without paying the tax "will subject one to heavy criminal penalties." Petitioners are merchants having established businesses and deal in a large number of articles and have an enormous number of separate sales (R. 19, 25-37, 40-42, 71, 106-110); and it can be said here, with even greater force than it was said in *Hill v. Wallace*, that to pay the tax on each of the many daily transactions which occur in the ordinary business of these merchants and then sue to recover it back would necessitate a multiplicity of suits and would be impracticable. Moreover, the statute affects not only these petitioners but a large number of other merchants in Porto Rico; and it is easy to see that if all these merchants paid their taxes on each of their sales and then sued to recover them, the courts in Porto Rico would be clogged with such a tremendous mass of such suits that the space of a generation would not suffice to try them all. To make the sales without paying the taxes is impossible (unless protected by injunction) because the penalties are so heavy that one day's business would entail fines sufficient to bankrupt any merchant or send him to jail for the rest of his life.

Enough has been said, therefore, to demonstrate that

the circumstances here are fully as extraordinary and exceptional as in *Hill v. Wallace*.

But there is much more than should be noted in emphasis of the exceedingly extraordinary situation here presented.

Every person who engages or attempts to engage in the manufacture of any article subject to taxation under the provisions of this act, and every dealer having taxable articles in his possession upon which taxes have not been paid, must furnish a bond to The People of Porto Rico in such sum as the Treasurer may require, and this bond is "liable" not only for all taxes but also for all fines that may be imposed for any violation of the act (Sec. 23).

Manufacturers of articles subject to taxation must keep stock books to be obtained from the Treasurer at the price of one cent per page, and all merchandise manufactured in one day must be entered at the end of that day, and each sale must be entered therein before any article is removed from the factory (Secs. 24, 25). A failure to comply with the provisions of the act regarding the stock books is a misdemeanor, and any unregistered product "may be seized by the Treasurer of Porto Rico or by his agents and by him sold for the benefit of the people of Porto Rico" (Sec. 27).

The taxes are to be paid by fixing and cancelling internal revenue stamps on documents and articles (Secs. 35, 71). Lack of the required stamps constitutes a misdemeanor (Sec. 35).

Internal revenue agents may enter any establishment to examine books and documents connected with the sale of articles subject to the tax (Sec. 43). The Treasurer may compel any person engaged in the manufacture or sale of any article subject to tax to make such alterations in buildings and equipment as he may think necessary to prevent fraud (Sec. 44). He also has power to determine the size and character of the packages in which taxable merchandise shall be stored (Sec. 46). For a failure to comply with the

Treasurer's requirements the Treasurer may revoke the license to do business (Sec. 46).

The following are made *misdemeanors*: Failure to declare the correct quantity of goods (Sec. 49); failure to pay the tax on the sale, transfer, use or consumption of any article subject to taxation (Secs. 50, 79); refusal to furnish documents or reports to the Treasurer or his agents when required by them (Sec. 51); removal of goods from a factory without having paid the tax (Sec. 52); continuing to engage in business without giving the required bond (Sec. 53); violation or failure to comply with any provision of the act or with any law relative to internal revenue or with any provision of regulations promulgated thereunder (Sec. 57); failure to file the monthly affidavit of sales (Sec. 78); failure to deliver account books, vouchers or invoices to the taxing officials (Sec. 80); failure to keep books or to enter the sales therein (Sec. 81).

Officers of corporations are liable for penalties assessed against the corporations of which they are officers (Sec. 60).

Sales of articles subject to the sales tax must be entered daily in special books provided by the Treasurer and affidavits must be filed each month showing the gross proceeds of the monthly sales (Secs. 63-67).

Persons bound to make payment of taxes must pay them without waiting to be required to do so (Sec. 68).

The Treasurer is authorized "to *impose and collect, through administrative proceedings*, from any person who fails to observe any of said regulations and in cases of misdemeanor under this act, a *fine* which shall not exceed \$25 for each offense, or he may, in his discretion, enter a complaint against said person before the proper court for failure to comply with the regulations or for committing a violation of the law" (Sec. 75). When the Treasurer imposes an "administrative fine" and payment is not made he may institute "distrainment proceedings" (id.).

Failure to pay the tax not only constitutes a misdemeanor but also subjects the person so failing to a *penalty* of 10% of the amount due (Sec. 77), and failure to declare a sale is not only a misdemeanor but also subjects the offender to a fine "equal to the amount of the sale or sales which he may have failed to declare, which fine shall be administratively imposed and collected."

This recital of the provisions of the act makes it very clear that, although we have thus far treated these cases as suits for the purpose of restraining the assessment or collection of a *tax*, they are in reality a great deal more. They are suits to restrain the enforcement of the tax statute, and an enforcement of that statute means a great deal more than collecting a tax. Petitioners are endeavoring to restrain seizure of their property, the imposition of penalties and of administrative fines, and prosecutions for misdemeanors.

If extraordinary and exceptional circumstances ever existed they certainly exist in these cases, and *Hill v. Wallace* clearly applies.

### POINT V.

**To construe the Act of March 4, 1927, as depriving petitioners of the right to relief in these cases would render it unconstitutional and void, because as so construed the statute would deprive them of all remedy.**

Apart from the remedy by injunction (which respondent insists is now taken away by the new statute), petitioners have no remedy whatever unless it be found in the tax refund statute quoted in the first opinion of the court below (R. 118 124; 16 Fed. 2d 546 548).

That tax-refund-statute is a wholly separate and independent statute, not a part of the tax statute here assailed. It provides that whenever a taxpayer believes a tax is illegal, he nevertheless must pay it under protest and then bring a suit against the Treasurer to recover it. But it is *not* and cannot be applicable to the taxes here involved because it requires that when the payment is made, it must be made under protest *and the protest must be indorsed upon a receipt and the receipt must be annexed to the complaint in the suit to recover the tax so paid* (Sees. 1 and 6, at R. 119-121). The taxes here complained of are paid by means of stamps affixed to the articles sold or documents transferred, *and in the very nature of things no receipt can be obtained and hence no suit to recover can be brought*. The record shows that in once instance the receipt was requested and was refused by the taxing officials (R. 22, 23). In order for a merchant to carry on his business, he must buy stamps in quantity in advance and then attach them to each article as and when the same is sold. He cannot "protest" when he buys a quantity of stamps in advance of any actual sale, because there is then no basis for a protest; and he cannot protest when he affixes the stamp to the article sold unless he make the impossible assumption that an internal revenue agent is going to be present at every sale of every article of merchandise made in Porto Rico.

The tax refund statute was enacted before the enactment of the taxing statute, here assailed, and it never was intended to apply to *stamp* taxes of this kind. Or, if intended to apply, its provisions are such that it *cannot* be complied with. *It affords no remedy whatever*.

Therefore, if the equitable remedy of injunction be taken away, no remedy at all is left.

Although no one may have a vested right to any *par-*

*ticular* remedy, it is well settled that to take away *all* remedy is to deny due process of law.

"To give operation to a statute whereby serious losses inflicted by such unlawful means are in fact *made remediless* is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law."

*Truax v. Corrigan*, 257 U. S. 312, 330.

"If the changing or repealing statute leaves the parties a *substantial remedy*, the legislature does not exceed its authority."

*Ettor v. Tacoma*, 228 U. S. 148, 155.

"If, as we have seen, he is denied *all remedy* for the wrong inflicted upon him, the deprivation of his property becomes just as effectual as though it had been taken from him by direct legislative enactment."

*Gilman v. Tucker*, 128 N. Y. 190, 202.

See, also:

*De Lima v. Bidwell*, 182 U. S. 1, 199, 200.

*Shiosberg v. N. Y. Life Ins. Co.*, 217 App. Div. 67;  
aff'd. 244 N. Y. 482.

*Reynolds v. Randall*, 12 R. I. 522, 524, 525.

*Price v. Hopkins*, 13 Mich. 318, 324, per COOLEY, J.

*Rhines v. Clark*, 51 Pa. 96.

*Sansberry v. Hughes*, 174 Ind. 638, 640.

## POINT VI.

**These cases have not become moot even if the Act of March 4, 1927, be applicable to pending cases.**

A case is said to become moot when subsequent events *destroy the actuality of the controversy* and make a decision of the questions presented *unnecessary to a determination of the rights of the parties*.

*United States v. Hamburg-American Co.*, 239 U. S. 466, 475.

*Berry v. Davis*, 242 U. S. 468.

*Public Utility Commissioners v. Compania General*, 249 U. S. 425.

The actuality of the present controversy certainly is not destroyed by the Act of March 4, 1927. Whether or not petitioners must pay the taxes imposed by the tax statute of August 20, 1925, and whether they may be fined and imprisoned and their property seized if they make sales without paying such taxes, is still a live controversy, not in any way affected by the Act of March 4, 1927; and a decision of the questions presented is still necessary to a determination of their rights.

During the period which has elapsed since the appeals to the court below were taken (a period which has now lengthened out to one year and nine months) petitioners have been paying to the Clerk of the District Court the amount of the taxes which would become due from them under the terms of the tax statute (R., 63, 81, 105, 138). *The amounts so deposited aggregate very large sums—several hundred thousand dollars at least.*

Whether or not petitioners are entitled to a return of that money, now in the custody and under the control of

the District Court, is far from being a moot or academic question. It presents a controversy of "present actuality."

Respondent's contention as to the effect of the Act of March 4, 1927, goes to the length of asserting that no court could make any order in these cases with respect to the disposition of the vast sums so deposited. And that of itself, we submit, is sufficient to show that his contention should not be sustained.

### **Conclusion.**

We ask that the Act of March 4, 1927, be declared inapplicable, and that the cases be set down for argument upon their merits.

Respectfully submitted,

CARROLL G. WALTER,

*Counsel for Petitioners.*

September, 1927.

APPENDIX

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Extracts from Act No. 85 of August 20, 1925, being the Tax Statute of the Legislature of Porto Rico complained of in these cases.

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## TITLE II

## EXCISE TAXES

## PART I

Section 16.—There shall be collected and paid, once only, an internal revenue tax on each of the following articles:

(Here follow 44 specifically enumerated articles, the production, manufacture, sale, use, or consumption of which in Porto Rico is declared to be subject to a tax).

## PART II

## DUTIES OF TAXPAYERS

Section 23.—Every person who engages or attempts to engage in the manufacture of any article subject to taxation under the provisions of this Act, shall serve notice thereof, in writing, on the Treasurer of Porto Rico, in such form as the latter may by regulation prescribe, and shall furnish a bond in favor of The People of Porto Rico in such sum as the Treasurer may require, which shall in no case exceed twenty thousand (20,000) dollars. Small manufacturers whose annual output does not exceed one thousand (1,000) dollars shall furnish a maximum bond of one hundred (100) dollars, and the Treasurer of Porto Rico may require a bond in favor of The People of Porto Rico of not

to exceed fifty (50) dollars in cases of manufacturers whose stock of articles subject to taxation is worth less than one thousand (1,000) dollars. Every dealer having taxable articles in his possession upon which taxes have not been paid, shall furnish a bond in favor of The People of Porto Rico in such amount as the Treasurer of Porto Rico may require. The amount of this bond shall be fixed according to the volume of business done. Said bond shall be liable for all taxes and fines that may be imposed upon him for violation of any of the provisions of this Act or of the regulations, and shall be furnished by the principal and two sureties, each of which latter shall possess unencumbered real property in Porto Rico to the value of at least twice the amount of the bond. In lieu of the personal bond above stated, the Treasurer of Porto Rico, in his discretion, may accept a cash bond equal to the amount of the bond, or securities, the amount of which he shall approve, or the undertaking of a surety company duly authorized to transact business in Porto Rico, and which has property or funds subject to attachment in Porto Rico.

Section 24.—Manufacturers of articles subject to taxation shall keep official stock-books in their factories and shall not remove them therefrom, and distillers shall have, in addition to this book, an invoice book for making payment of the tax. The said books shall be furnished by the Treasurer of Porto Rico upon payment of one (1) cent for each page thereof.

Section 25.—In the stock book, all merchandise completed or manufactured in a natural day shall be entered at the termination of said day, and distillers and manufacturers of cigars or cigarettes shall further enter the internal-revenue stamps at the precise moment of receiving them at the factory, and, further, every manufacturer shall enter in said book, before removing the article from the

factory, each sale or shipment made, including the name and address of the buyer or receiver and the stamps cancelled or the number of the export way-bills covering said articles, and in addition, such other information as the Treasurer of Porto Rico may by regulation prescribe. In cases of distilled spirits, their alcoholic degree and the number of the respective receptacle or receptacles in which such product is contained, shall be entered.

Section 27.—The official invoice and stock-books shall at all times be open to inspection by internal-revenue officers. Every person who fails to comply with any of the provisions of this Act regarding the aforesaid books, shall be guilty of misdemeanor, and the unregistered product may be seized by the Treasurer of Porto Rico or by his agents, and by him sold for the benefit of The People of Porto Rico.

Section 35.—That all excise taxes provided for in this Act shall be paid by affixing and cancelling internal revenue stamps on such documents and articles, as for such purpose the Treasurer of Porto Rico may prescribe. Such stamps shall be furnished by the Treasurer of Porto Rico to collectors of internal revenue in such quantities as may be necessary for local needs; *Provided*, That for the purpose of identifying certain taxable articles such as arms and others which, in the judgment of the Treasurer of Porto Rico, it may be necessary to identify so as to prevent fraud, the Treasurer of Porto Rico is hereby authorized, through the promulgation of rules and regulations, to cause to be affixed to the said articles stamps or other adequate marks which shall be furnished gratis to the taxpayers by the Treasurer of Porto Rico; *Provided, further*, That the Treasurer of Porto Rico may affix such stamps on taxable articles acquired while former excise tax laws were in force and which articles are on the market when this Act takes effect.

The lack of such stamps or marks on the articles required by regulations, shall constitute a misdemeanor.

Section 37.—Dealers shall be liable for the payment of the tax upon selling or transferring the taxable article to another dealer or to a consumer.

Section 38.—The consumer shall be liable for the payment of the tax upon coming into possession of the taxable article for use or consumption in Porto Rico.

Section 39.—Taxes prescribed by this Act on the sale, transfer, use or consumption in Porto Rico of articles comprised in section 16 shall be paid by the dealer upon selling or transferring the taxable article to another dealer or to a consumer.

### PART III

#### POWERS OF THE TREASURER

Section 43.—Internal revenue agents may enter any establishment, factory, office or place to examine books and documents connected with the sale, use or manufacture of articles or with the holding of public spectacles subject to this Act.

Section 44.—The Treasurer of Porto Rico shall at all times have power to compel any person engaged in the business of distilling, tobacco manufacturing or in the manufacture, making or sale of any article subject to tax, to make such alterations in buildings, stills, utensils, boilers, vats, tubes, pipes and apparatus in general as he may think necessary for the proper protection of The People of Porto Rico against fraud, and may require such persons to install such notice boards, measuring apparatus, tubes, tanks, retainers, receptacles for the finished or partly finished prod-

net and such other utensils or things as in his judgment may be necessary.

Section 45.—The Treasurer shall have power to determine the size and character of receptacles and packages in which merchandise taxable under this Act shall be stored within the factory or removed therefrom, and may prescribe by regulations the manner in which the marks and numbers on such receptacles and packages shall be made thereon or erased therefrom.

Section 46.—The license of every person failing or refusing to comply with the requirements of the Treasurer of Porto Rico, with respect to such alterations in buildings, stills, utensils, boilers, vats, tubes, pipes and apparatus in general, or to the size and character of the receptacles and packages, marks and numbers, referred to in this Act, may be revoked by the Treasurer of Porto Rico.

## PART IV

### PENALTIES

Section 49.—Any person who, for the purpose of payment of the taxes prescribed by this Act, shall for any reason declare smaller quantities than those produced, manufactured, obtained or deducted, shall be guilty of a misdemeanor.

Section 50.—Any person who shall sell, transfer, use or consume any article subject to taxation under this Act, without paying the said tax at the time and in the manner herein provided, shall be guilty of a misdemeanor.

Section 51.—Any person who deals in, handles, has in store, or shall have had merchandise taxable under this Act, and refuses to furnish or prevents the furnishing of

documents or reports in connection therewith to the Treasurer of Porto Rico or to his agents, when required by them, shall be guilty of a misdemeanor.

Section 52.—Any person who sells or disposes of taxable articles or removes them from a factory without having paid the tax thereon in the manner specified in the preceding section, except as the Treasurer of Porto Rico may by regulation prescribe, shall be guilty of a misdemeanor.

Section 53.—Any person who engages in or continues the industry of distilling or manufacturing any taxable article without having furnished a bond in the manner and under the requirements provided by this Act, shall be guilty of a misdemeanor.

Section 57.—Any person who violates or fails to comply with any of the provisions of this Act, or with any law relative to internal revenue, or with any provision of such regulations as may be promulgated thereunder; and any person who knowingly aids, abets or otherwise helps another to violate this Act, or to fail to comply with any of its provisions or with any other law or regulation thereunder relative to the internal revenue of Porto Rico, where no other penalty is specifically provided, shall be guilty of a misdemeanor.

### TITLE III

#### SALES TAXES

##### PART I

##### LEVYING OF TAXES

Section 62.—There shall be levied and collected on the sale of any articles the object of commerce, not specified in section 16 of this Act or exempted from taxation as pro-

vided in said section, a tax of two (2) per cent on the price or value of the daily sales of such articles, whether such sales are for cash or on credit, which tax shall be paid at the end of each month by the person making such sales.

## PART II

### DUTIES OF TAXPAYERS

Section 63.—From and after the date of approval of this Act, persons comprised in the preceding section, whatever the nature of their business may be, shall file on the last day of each month and not later than within the ten days following, an affidavit showing the gross proceeds of the monthly sales made, whether for cash or on credit, of all articles covered and defined by section 62 of this Act.

Section 64.—Said affidavit, showing the total price or value of the articles sold during the month, shall agree absolutely with the entries made in the account books of the person swearing to the affidavit.

Section 65.—For the purpose of complying with this Act, all persons bound to pay the tax provided in section 65 hereof, shall keep books of account under such requirements as the Treasurer of Porto Rico shall by regulation prescribe, in which books they shall daily enter the amount of their sales, whether for cash or on credit, as well as such special books as the Treasurer of Porto Rico may direct; *Provided*, That said books shall be bound and folioed and authorized on the first page by the Treasurer of Porto Rico, a collector of internal revenue or an internal revenue agent.

Section 67. When said affidavit has been sworn to, it shall be forwarded or delivered within the prescribed term to the internal revenue agent of the proper district or to

the collector of internal revenue in the town where the business of the taxpayer is located.

Section 68.—Persons bound hereunder to the payment of the taxes specified in section 62, shall pay such tax without waiting to be required to do so by the internal revenue agents, and they shall make such payments in such form as the Treasurer of Porto Rico may by regulation prescribe.

Section 69.—Every manufacturer, wholesale dealer, retail dealer, representative, commission merchant or any other person making sales, when so required by the duly authorized officers of the Department of Finance shall produce his account books and any other evidence relative to purchases or sales made by him, and shall permit said officers to examine such books and documents and to take note of any entry made therein.

Section 70.—Any person who, after this Act takes effect, commences any business on which he must pay the tax herein prescribed, shall serve written notice on the Treasurer of Porto Rico within the first five days after commencing business. When such business is discontinued, he shall likewise serve notice on the Treasurer of Porto Rico and shall make his affidavit covering such sales as he shall have made during the month in which his business is discontinued.

### PART III

#### PAYMENT OF TAX

Section 71.—The sales tax specified in this Act shall be paid by affixing internal revenue stamps to the documents prepared for the purpose by the Treasurer of Porto Rico and cancelling said stamps on the documents.

## PART IV

## POWERS OF THE TREASURER

Section 74.—The Treasurer of Porto Rico or, in his stead, any internal revenue agent or any other officer or employee of the Department of Finance, designated by the Treasurer of Porto Rico, shall be authorized to make investigations periodically, or at any time it may be necessary, for the purpose of establishing the truth of the information contained in the affidavits filed.

Section 75.—The Treasurer of Porto Rico is hereby authorized to impose and collect, through administrative proceedings, from any person who fails to observe any of said regulations and in cases of misdemeanor under this Act, a fine which shall not exceed twenty-five (25) dollars for each offense, or he may, in his discretion, enter a complaint against said person before the proper court for failure to comply with the regulations or for committing a violation of the law.

When the Treasurer of Porto Rico imposes an administrative fine in accordance with the preceding provision, and the payment thereof is not made, said official may institute distraint proceedings in order to make said fine effective.

Section 76.—Internal revenue officers are hereby empowered to enter any establishment, the owners or representatives of which are hereby obliged to pay a tax, to ascertain whether or not such owners or representatives are complying with the provisions of this Act.

## PART V

## PENALTIES

Section 77.—When a person obliged by this Act to pay a tax on the amount of his monthly sales fails to do so in the form and at the time hereby provided, he shall pay, in

addition to said tax and as part thereof, by way of penalty, ten (10) per cent of the amount due.

Section 78.—Any person refusing to file the monthly affidavit of his sales, as hereby required, or who makes a false or fraudulent affidavit, shall be guilty of a misdemeanor and punished by a fine of not less than one hundred (100) dollars nor more than one thousand (1,000) dollars, or by imprisonment for a term of not less than thirty (30) days nor more than one (1) year, or by both penalties, in the discretion of the court.

Section 79.—Every person refusing to pay the tax herein provided shall be guilty of a misdemeanor.

Section 80.—Every person obliged hereby to pay a tax, who refuses to deliver, or through whose fault the account books, business invoices or any other voucher are not delivered to the duly authorized officers of the Department of Finance for examination, shall be guilty of a misdemeanor.

Section 81.—Every person who makes sales, the amount of which must be declared under oath to the Treasurer of Porto Rico in accordance with this Act, without keeping the books hereby required, or without daily entering the total amount of daily sales in said books, or who fails to include the amount of any sale in said total, shall be guilty of a misdemeanor.

Section 82.—Every person who makes sales, the amount of which should be declared under oath to the Treasurer of Porto Rico in accordance with this Act, and fails to declare it, besides being guilty of misdemeanor as defined in the preceding section, shall pay into the Treasury of Porto Rico a fine equal to the amount of the sale or sales which he may have failed to declare, which fine shall be administratively imposed and collected.

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CHARLES ELMORE C

# Supreme Court of the United States

OCTOBER TERM, 1927.

No. 211.

T. H. SMALLWOOD, W. F. SMALLWOOD, A. D.  
SMALLWOOD, *et al.*, etc.,

Petitioners,

—vs.—

JUAN G. GALLARDO, TREASURER OF PORTO RICO.

No. 212.

ADOLFO VALDES ORDONEZ, SALVADOR GARCIA,  
VICTOR OCHOA, *et al.*, etc.,

Petitioners,

—vs.—

JUAN G. GALLARDO, TREASURER OF PORTO RICO.

No. 213.

INSULAR MOTOR CORPORATION,

Petitioner,

—vs.—

JUAN G. GALLARDO, TREASURER OF PORTO RICO.

## PETITIONERS' REPLY BRIEF

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# Supreme Court of the United States

October Term, 1927

T. H. SMALLWOOD, W. F. SMALLWOOD,  
A. D. SMALLWOOD, *et al.*, etc.,  
Petitioners,

—vs—

JUAN G. GALLARDO, TREASURER OF  
PORTO RICO

No. 211

ABILEO VALDES ORDOÑEZ, SALVADOR  
GARCIA, VICTOR OCHOA, *et al.*, etc.,  
Petitioners,

—vs—

JUAN G. GALLARDO, TREASURER OF  
PORTO RICO

No. 212

INSULAR MOTOR CORPORATION,  
Petitioner,

—vs—

JUAN G. GALLARDO, TREASURER OF  
PORTO RICO

No. 213

## PETITIONERS' REPLY BRIEF.

Time is available for a short response only. This will be confined to what is not already covered by our original brief.

### I.

The first and fifth and most of the third and sixth points of respondent are wholly outside the limits prescribed for the October 3 hearing. His discussion is of matters which he unsuccessfully urged on the Circuit Court of Appeals

and which it would be impertinent to argue here even on consideration of the merits except after leave to assign cross errors.

## II.

The second point begs the question. It rests solely upon the assumption that the new statute applies to pending cases. Respondent asserts that, if so, the statutes defining the jurisdiction of the District Court of the United States for Porto Rico have been amended or partially repealed. That is his contention in its entirety. But the very nub of the controversy is as to how the provision added by section 7 of the Act of March 4, 1927, should be construed. It contributes nothing toward a solution of the problem to say that an interpretation in respondent's favor would change pre-existing statutes.

## III.

The part of his third and sixth points not treated in our original brief or determined below adversely to respondent relates exclusively to a Porto Rican statute (Respondent's Appendix I) enacted April 19, 1927, subsequent to the filing of the petition for certiorari in this Court, and to regulations of the treasury department of Porto Rico (Respondent's Appendix VIII) adopted October 13, 1925, subsequent to the institution of all these suits (R., 14, 59, 76). Manifestly the statute and regulations are of no concern at this stage. Moreover, the regulations deal solely with taxes under section 62 of the statute of 1925, whereas two of the cases (Nos. 211-2) arise under the statute of 1923 and the third (No. 213) arises under section 16 of the Act of 1925.

## IV.

Only scrutiny of the decisions themselves will adequately demonstrate the error of respondent in saying, with respect to the issue of interpretation, that there is a distinction be-

tween statutes affecting procedure or remedy and statutes affecting vested rights. If the question were as to the power to legislate or as to validity of the statute, the difference would exist. What, however, within the meaning of particular language, is retrospective in operation in no wise depends on whether the subject is procedure or remedy or is a vested right. The settled rules are identical for interpreting statutes of both classes. True, some courts use the fact, that application of a new statute to a pending case would destroy a vested right, as one of the grounds for refusing to ascribe to the legislature intention to bring about that result; but the canons summarized in our original brief are the same for construing statutes with regard to procedure or remedies as for construing those with regard to vested rights. In addition, what constitutes a vested right frequently presents a narrow or abstruse question; and it is sufficient now to remark that, upon the records in the present causes, an interpretation which would deprive tax payers of a remedy with respect to the large funds held in the registry of the court in Porto Rico would plainly be such deprivation of vested rights as to amount to denial of due process and that an interpretation imperiling those funds should be rejected.

Dated, October 1, 1927

Respectfully submitted,

FRANCIS G. CAFFEY,  
Counsel for Petitioners.



FILED

OCT 3 1927

CHARLES ELMORE CROSBY  
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1927

No. 214

ADOLFO VALDES, PIO PEREZ, LUIS C. CUYAR,  
*et al., etc.,*

*Petitioners,*

vs.

JUAN G. GALLARDO,  
*Treasurer of Porto Rico.*

No. 215

FINLAY, WAYMOUTH & LEE, INC.,

*Petitioners,*

vs.

JUAN G. GALLARDO,  
*Treasurer of Porto Rico.*

No. 216

ANGEL ABARCA PORTILLA, RAFAEL ABARCA  
PORTILLA, ENRIQUE ABARCA SANFELIZ,  
*et al., etc.,*

*Petitioners,*

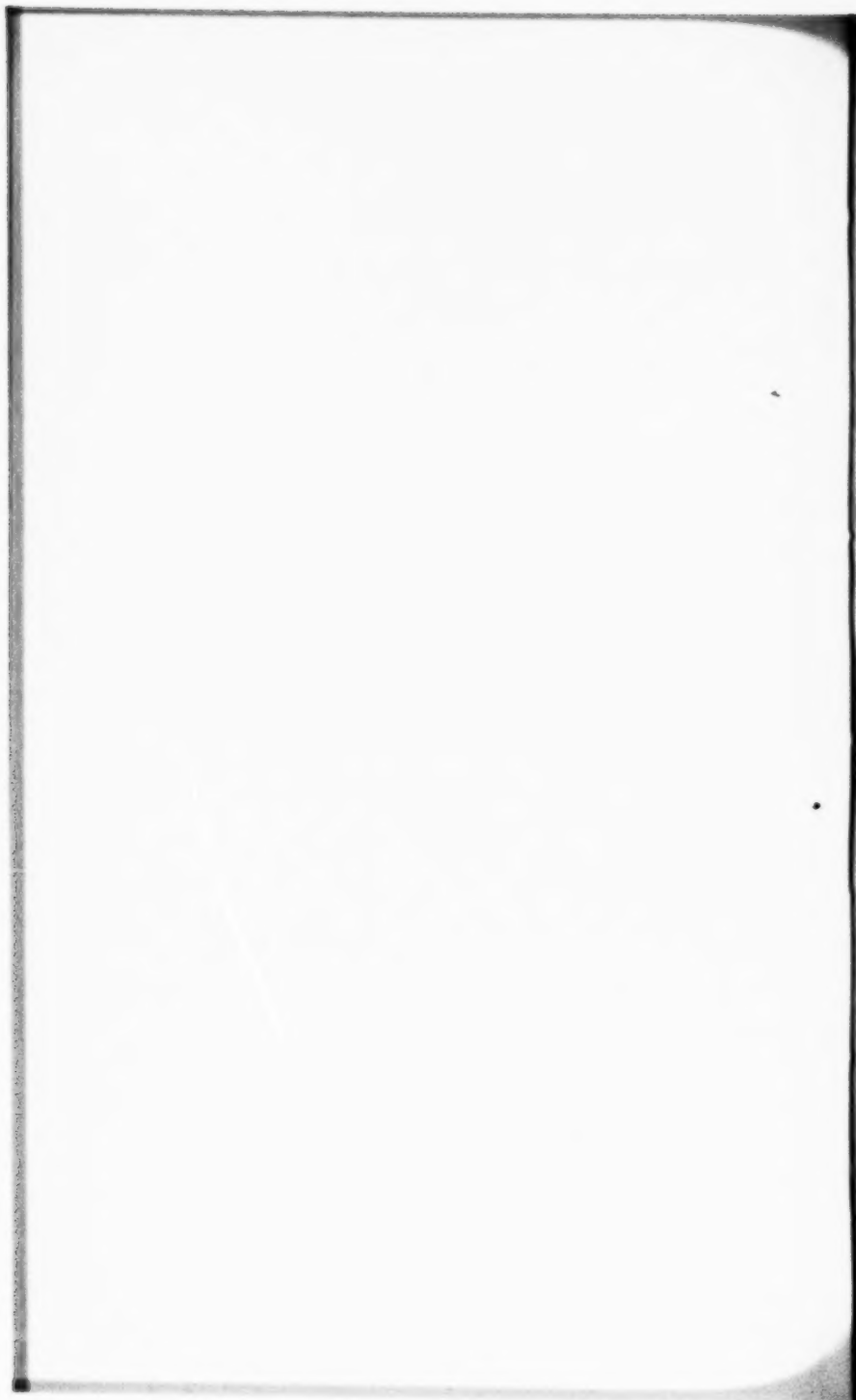
vs.

JUAN G. GALLARDO,  
*Treasurer of Porto Rico.*

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIRST CIRCUIT.

## PETITIONERS' REPLY BRIEF

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# Supreme Court of the United States

OCTOBER TERM, 1927.

ADOLFO VALDES, PRO PEREZ, LUIS C. CUYAR,  
*et al.*, etc.,

*Petitioners,*

*vs.*

No. 214

JUAN G. GALLARDO, Treasurer of Porto  
Rico.

FINLAY, WYMOUTH & LEE, INC.,

*Petitioner,*

*vs.*

No. 215

JUAN G. GALLARDO, Treasurer of Porto  
Rico.

ANGEL ABARCA PORTILLA, RAFAEL ABARCA  
PORTILLA, ENRIQUE ABARCA SANFELIZ,  
*et al.*,

*Petitioners,*

No. 216

*vs.*

JUAN G. GALLARDO, Treasurer of Porto  
Rico.

## PETITIONERS' REPLY BRIEF.

Respondent, it seems to us, quite needlessly has burdened the court with a vast amount of wholly irrelevant matter

We shall endeavor very briefly to separate the wheat from the chaff and answer what is germane to the question being argued.

## I.

Whether or not Section 3224 U. S. Rev. Stat. was applicable to Porto Rico, and whether or not petitioners had an adequate remedy at law at the time they brought these suits, are not within the scope of the question this court has directed to be argued. Respondent's contention on each of those points has been ruled adversely to him by the Circuit Court of Appeals. They thus go to the merits of these cases, and the merits are not being argued at this time. Consequently respondent's Points I and V and Appendices I, II, III, IV and VII may be disregarded.

## II.

Respondent's Point II (Brief, pp. 13-22) is based upon the assumption that the Act of March 4, 1927, is a modification or diminution or withdrawal of the jurisdiction of the District Court. That assumption is unwarranted and hence the argument and authorities cited are immaterial.

If Congress had intended to modify or diminish the jurisdiction of the District Court it certainly would have said so directly and in terms—as it did in the Act of February 13, 1925, referred to in *Federal Land Bank v. U. S. Nat. Bank*, 13 Fed. (2d) 26, quoted on page 14 of respondent's brief. It would not have resorted to indirection and ambiguity.

There may appear to be little difference between say

ing "The District Court shall not have jurisdiction to grant an injunction restraining the assessment or collection of any tax" and saying "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained." But some difference there certainly is. And not the least difference is that even if the former form of expression indicate an intent that no injunction shall be granted after the act is passed, the latter form of expression certainly indicates an intent to regulate future suits only.

That the Act of March 4, 1927 is not a modification or diminution or withdrawal of *jurisdiction* is manifested by the fact that its prototype, U. S. Rev. Stat., Sec. 3224, has not been so regarded. If Section 3224 had been a limitation upon the jurisdiction of the courts, this court could not have held, as it did hold in *Hill v. Wallace*, 259 U. S. 44, that it "does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provision inapplicable." If jurisdiction did not exist the court could not grant the injunction however extraordinary or exceptional the circumstances were, and the fact that the injunction was granted in *Hill v. Wallace* shows that Section 3224 is not regarded as regulating the jurisdiction of the court.

Both Section 3224 and the Act of March 4, 1927 are addressed to and are limitations upon the rights and powers of the *taxpayers* rather than upon the rights and powers of the *court*.

As the Act of March 4, 1927, is not a limitation upon the jurisdiction of the court, it follows that none of the

authorities cited under Point II of respondent's brief is relevant.

Respondent calls attention to the fact that in enacting Section 41 of the Organic Act of Port Rico, Congress inserted a proviso saving the jurisdiction over then pending cases (Res. Brief, p. 19); and from that he argues that as no similar proviso was inserted in the Act of March 4, 1927, the necessary conclusion is that Congress intended not to save pending cases (id. p. 20). But respondent's own brief furnishes an answer to that argument. If the Act of March 4, 1927 is to be read as an amendment to Section 41 of the Organic Act (which is the assumption upon which respondent's Point II is based), *then it of course becomes subject to the saving clause therein contained* and Section 41 is to be read as if it conferred general jurisdiction and then excluded suits for injunctions in tax cases and then saved pending cases. For obviously respondent cannot treat the Act of March 4, 1927, as a part of Section 41 for the purpose of construing it as a diminution of the jurisdiction there conferred and then treat it as outside of Section 41 for the purpose of avoiding the saving clause. If he wish to have the Act of March 4, 1927, construed as if it amended Section 41, he must take the consequences of reading the entire amended section as a whole—saving clause and all.

### III.

In Point III of his brief respondent argues (a) that there are no unusual circumstances bringing these cases within the implied exception stated and enforced in *Hill v. Wallace*, and (b) that such an implied exception is not

applicable to the Act of March 4, 1927, "since the District Court of the United States for Porto Rico is not a constitutional court of the United States" (Res. Brief, p. 22).

Dealing with the latter argument first, the obvious resort is that neither are the District Courts located in the several States "constitutional courts of the United States." Those District Courts were created by Congress. Like the District Court for Porto Rico, they are "but the creature of Congress exercising such powers, and such powers only, as the Congress may have granted to them." Congress could abolish them just as well as it could abolish the District Court for Porto Rico. The doctrine of *Hill v. Wallace* hence is just as applicable to the Act of March 4, 1927, as it is to Section 3224.

Returning now to the first branch of the argument. To say that there are no exceptional or unusual circumstances in these cases is to push naivete to the point of irony. We cannot believe that even counsel for the respondent could keep his face straight while saying it.

The circumstances here are identical with those which were held in *Hill v. Wallace* to be so exceptional as to make Section 3224 inapplicable, viz., to make a sale without paying the tax subjects the seller to heavy criminal penalties, and to pay the tax on each of the many daily sales and then sue to recover it back would necessitate a multiplicity of suits and would be impracticable (See pp. 14-18 of our first brief).

Respondent points out that under regulations adopted by him after many of these suits had been brought (including Nos. 214 and 216) the sales tax is computed and paid once a month upon all sales had during the month (Res.

Brief, pp. 23, 103-105). But he glosses over the fact that the excise tax is payable "upon selling or transferring the taxable article" (Sec. 37) and must be paid "by affixing and cancelling internal revenue stamps on such documents and articles" (Sec. 35). The plain truth is that the sale of a box of matches without affixing the stamp might land the seller in jail for a year and subject him to a fine of a thousand dollars; and if he sold ten boxes he could be fined ten thousand dollars and sent to jail for ten years. The same thing is true with respect to forty three other articles subject to the excise tax.

Every merchant is making many sales of such articles each day. Each merchant must pay the tax on each sale or stop selling or go to jail.

#### IV.

We confess our inability to follow or understand respondent's Point IV.

1. So far as it asserts that petitioners have no vested right in any *particular form* of procedure we agree with it. We agree, also, with its concession that petitioners have a *right* to "a reasonable opportunity to test the validity of the taxes of which they complain". (Res. Brief, p. 25.) If the Act of March 4, 1927, be construed as depriving them of the right to relief in these cases that conceded right certainly is taken away, for the reasons pointed out at pp. 18-20 of our first brief.

Respondent's assertion that petitioners might file a bill for injunction *in an insular court* (an assertion thrice repeated at pp. 11, 23, 25 of his brief) is a MISSTATE-

MENT, doubtless inadvertent, arising from counsel's failure to remember that Section 4 of the Insular Injunction Law (Sec. 1357 of 1911, Comp. of Porto Rico Codes and Statutes) provides:

"An injunction cannot be granted: \* \* \*

"3. To prevent the execution of a public statute by officers of the law for the public benefit."

To that there has now been added by Act No. 26 of April 23, 1927 (Laws of Porto Rico of 1927, pp. 166, 168):

"7. To prevent the levy or collection of any tax levied by the laws of the United States or of Porto Rico."

Injunctions are thus effectively barred in the Insular Courts as well as in the District Court.

2. If respondent mean that there is a distinction as to the *power to enact* statutes changing the remedy and the *power to enact* statutes affecting vested rights, he may be correct; but if he mean that a statute which takes away an existing remedy is *not* retrospective, whereas a statute which, in the same words, takes away a vested right is retrospective, we submit that the argument is too grossly absurd for discussion. If an existing right be taken away by a statute, that statute is retrospective whether the right taken away be described as substantive or remedial.

3. If respondent mean to deny that the rule that statutes are not to be given a retrospective or retroactive effect does not apply to statutes governing procedure, he is

clearly wrong. We again quote the language of this court in *United States v. St. Louis, etc. Ry. Co.*, 270 U. S. 1, 3:

"That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. **It has been applied by this court to statutes governing procedure.**"

The cases of *Fullerton Co. v. Northern Pacific Ry. Co.*, 266 U. S. 435, and *United States v. St. Louis, etc. Ry. Co.*, 270 U. S. 1, both related to statutes of limitation; and statutes of limitation, in this country at least, are "treated as laws of procedure and as belonging to the *lex fori*, as affecting the remedy only and not the right" (*Davis v. Mills*, 194 U. S. 451, 454; *Pritchard v. Norton*, 106 U. S. 124, 130, 131).

Those cases thus demonstrate that statutes changing procedure or affecting remedies and statutes affecting so-called substantive or vested rights are both subject to the same rule of construction, viz., that they are not to be given a retroactive effect unless imperatively required.

## V.

In the last analysis the fundamental question here is one of interpretation. *Did Congress intend that the Act of March 4, 1927, should apply to these cases?*

The cases present important questions as to the power of Porto Rico to tax sales of goods brought there from continental United States and from foreign countries and as to its right to discriminate against such goods in favor of domestic products. The cases had been litigated through

the District Court and the Circuit Court of Appeals. The tax statute had been sustained in part and adjudged partly invalid. No injunctions had been issued, but the Circuit Court of Appeals had directed the issuance of injunctions as to goods imported from foreign countries. Everyone knew that applications for certiorari to bring the cases here for final decision were to be made.

*Was Congress consciously and deliberately intending to prevent a review of these cases by this court? Was it consciously and deliberately intending to prevent the issuance of the injunction which the Circuit Court of Appeals had ordered?*

Was Congress consciously and deliberately saying to the taxpayers and the insular authorities: "Although you have carried this litigation through the lower courts and nearly to the Supreme Court, you must now, on March 4, 1927, throw away the time and labor expended upon that litigation and go back and start over again, by paying the taxes under protest and then suing in the insular court to recover them, taking further appeals to the Circuit Court of Appeals, which already has decided the questions, and then go up to the Supreme Court in another form of action after a delay of several years. And meanwhile you taxpayers and insular authorities must remain in uncertainty and doubt as to what taxes you must pay and what taxes you have authority to exact. The promotion and prolongation of litigation is for the benefit of the public, and uncertainty and delay are desirable. Final decisions as to your power should be delayed as long as possible. Business men should be compelled to remain in a state of un-

certainty as to their taxes, to the end that enterprise may be stagnated."

That, in substance, is what respondent would have this court say is what Congress intended.

There was no emergency necessitating the immediate cutting off of the power of the District Court to issue injunctions in tax cases. *The Governor of Porto Rico himself had told Congress that while conditions had been bad in the past the trouble had been eliminated and that taxes were being collected rapidly and satisfactorily.* (See statements of Governor Towner at pp. 91, 92, 93, of respondent's brief.)

Is it not plain, then, that the legislation was sought and granted *for the future only*? Can it be believed that, with that representation before it, Congress intended that this statute should be given a construction which would prevent an early determination by this court of questions which already had been decided in the Circuit Court of Appeals and which were about to be brought here by certiorari?

Common sense revolts at the idea that Congress intended any such thing. Every consideration of expediency and justice—and, we add, the best interests of Porto Rico itself, despite its Attorney General's attitude to the contrary—demand that the statute be construed as inapplicable to pending cases, to the end that there may be a speedy determination by this court of the questions of law involved as to the validity of the taxes which Porto Rico seeks to exact.

If respondent be correct in his contention that the petitioners have a plain, adequate and complete remedy by

paying the taxes and suing to recover them, and may yet pursue that remedy without embarrassment or difficulty and without fear of being "tricked" out of their money by the insular authorities, then the most that will be accomplished by holding that the Act of March 4, 1927, applies to these cases will be the delay and expense incident to the litigation which will be involved in such suits for the recovery of the taxes. Certainly there is nothing helpful or beneficial to anyone in adopting that course when cases presenting the questions as to the validity of the taxes already are in this court ready for immediate argument and determination.

If doubt existed as to how the Act of March 4, 1927, should be construed, that consideration of itself would be sufficient to cause the doubt to be resolved in our favor.

Respectfully submitted,

CARROLL G. WALTER,

*Counsel for Petitioners.*

MAY 6 1936

U. S. STAMPS

# In the Supreme Court of the United States

OCTOBER TERM, A. D., 1936

No. [REDACTED] 211

T. H. SMALLWOOD, et al,

*Petitioners,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

No. [REDACTED] 212

ADOLFO VALDES ORTIZ, et al,

*Petitioners,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

No. [REDACTED] 213

INSULAR MOTOR CORPORATION, *Petitioner,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

GEORGE C. BUTTE,

*Attorney General of Porto Rico,*

WILLIAM CAYTON KERRY,

*Lieutenant Colonel, Judge Advocate,*

*Attorneys for Respondent.*



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# In the Supreme Court of the United States

OCTOBER TERM, A. D., 1926

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No. 1018.

T. H. SMALLWOOD, *et al*,

*Petitioners,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

---

No. 1019.

ADOLFO VALDES ORDONEZ, *et al*,

*Petitioners,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

---

No. 1020.

INSULAR MOTOR CORPORATION, *Petitioner,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

---

BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR WRITS OF CERTIORARI.

---

REASONS WHY WRITS OF CERTIORARI SHOULD  
NOT ISSUE.

The single ground stated by petitioners as a reason for the issuance of the writs of certiorari in these cases is that, as petitioners claim,

"These cases involve an important federal question which has been decided below in a way probably in conflict with the applicable decisions of this court." (Petition, pp. 1-2.)

*No other ground is alleged in the petition.*

Respondent submits, however, that an examination of the petition shows that no ground appears for the issuance of the writs in these cases, because:

(1) It appears that the opinion and decrees of the Circuit Court of Appeals were strictly in accord with the applicable decisions of this court (*Woodruff v. Parham*, 8 Wall. 123; *Sonneborn v. Cureton*, 262 U. S. 506; *Texas Co. v. Brown*, 258 U. S. 466, 476-477) and

(2) In any event the questions petitioners seek to submit are no longer of general importance; since by the amendment of Section 3 of the Organic Act of Porto Rico ("Jones Law"; 39 Stat. 953) effected by Section 1 of the recent Act of March 4, 1927 (S. 4247, Pub. No. 797, 68th Cong.), Congress has now expressly provided:

"That the internal revenue taxes levied by the Legislature of Porto Rico in pursuance of the authority granted by this act on articles, goods, wares, or merchandise, may be levied and collected as such Legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island: Provided, That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico. Officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Porto Rican government in the collection of these taxes."

Congress having thus expressly declared that the Porto Rican government does have the power to levy taxes such as those here assailed, the questions sought to be presented by petitioners no longer have any general public interest; but affect only these particular suits and any others that may have been brought prior to that declaratory amendment to the Organic Act.

(3) *The questions here sought to be presented by these petitioners have now become moot*; since, by the amendment of Section 48 of the Organic Act of Porto Rico effected by Section 7 of the Act of March 4, 1927 (S. 4247; Pub. No.

797, 69th Cong., *supra*), no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico may now be "maintained" in the Federal District Court for Porto Rico; and, therefore, in case the decrees of the District Court in these cases dismissing the bills of complaint were reversed and these cases sent back to that court, that court could do nothing but dismiss them for want of jurisdiction, because they are all purely suits to enjoin collection of Insular taxes imposed by the laws of Porto Rico, which suits may no longer be "maintained" in the District Court, under the express prohibition of Congress.

### POINT I.

THE OPINION AND DECREES OF THE CIRCUIT COURT OF APPEALS WERE STRICTLY IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

The position now taken by these petitioners in their petition here, and in their brief in support of it, is tantamount to saying that Porto Rico is not within the protection of the tariff wall of the United States; and that, therefore, goods brought into Porto Rico from the continental United States are to be considered in the same way as though they were imports from foreign countries.

But it is clear that it was the intention of Section 3 of the Foraker Act (Act of April 12, 1900, 31 Stat. 77-78; continued in effect by Section 58 of the "Jones Act"; 39 Stat. 958; p. 29 "Appendix" to Petitioners' Brief) *to establish free trade between Porto Rico and the continental United States*. That section provides:

"Sec. 3. That on and after the passage of this Act all merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of 15 per centum of the duties which are required to be levied, collected and paid upon like articles of merchandise imported from foreign countries; \* \* \* \* *Provided*, That \* \* \* \* whenever the legislative assembly of Porto Rico shall have enacted and put into operation a system of local taxation \* \* \* and shall by resolution duly passed so notify the President, he shall make proclamation thereof, and thereupon all

tariff duties on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico shall cease, and from and after such date all such merchandise and articles shall be entered at the several ports of entry free of duty; and in no event shall any duties be collected after the first day of March, 1902, on merchandise and articles going into Porto Rico from the United States or coming into the United States from Porto Rico."<sup>1</sup> (*Italics ours.*)

*In other words, it is believed to be plain beyond peradventure that it was the obvious intent of Congress to bring Porto Rico within the tariff wall of the United States, and to place it in exactly the same position so far as concerns goods brought into it from the continental United States, or sent from it to one of the States of the Union, as though it were itself a State.*

That is to say, it is believed clear that there is precisely the same right to bring goods into Porto Rico from New York that there is to take goods into Louisiana or Iowa or Mississippi from New York,—and subject to the same right of the jurisdiction into which they are brought, to tax them. That is to say, if these identical statutes here in question had been passed by Louisiana, then, if those laws of Louisiana would be valid and the taxes levied under them assessable against goods brought into Louisiana from New York under the same conditions as those under which the automobiles here in question were brought into Porto Rico, in that case these laws of Porto Rico are likewise valid, and these taxes properly assessable against the goods here in question.

<sup>1</sup> The substance of the above section (Sec. 3 of the Foraker Act, 31 Stat. 77, 78) is epitomized in Section 718 of Chapter 4, Title 48 of the new United States Code (printed on page 29 of the "Appendix" to Petitioners' brief); but in so doing the editors of the Code have failed to give effect to the word "tariff" in the phrase "tariff duties" as used in Section 3 of the Foraker Act as above quoted. But that word "tariff" is believed to be of vital importance. It characterizes the kind of "duties" to which Congress was referring in the immediately following clauses of that section of the Foraker Act. Plainly, what Congress had in mind were simply the "tariff duties" collected at the custom houses,—a phrase which is by no means coextensive with the phrase "any imports or duties on imports or exports" as used in Clause 2 of Section 10, Article I, of the Constitution; the latter phrase, limiting the power of the States, having been construed by this court in *Brown v. Maryland*, 12 Wheat. 419, and many following cases, to include very much more than tariff duties.

But it is only tariff duties which are within the purview of Section 3 of the Foraker Act.

"Free trade" between Porto Rico and the continental United States means exemption from "tariff duties."

But it is manifest that under the decisions of this Court in *Woodruff v. Parham*, 8 Wall. (U. S.) 123, and *Sonneborn v. Cureton*, 262 U. S. 506 (TAFT, CH. J.), such a law by Louisiana would be valid, and would be assessable against the property of petitioners in the circumstances shown by these cases; since it

(a) does not prohibit the sale or disposition or use of the goods in Louisiana (*Porto Rico*);

(b) does not discriminate against goods brought in from another State in favor of those manufactured in Louisiana (*Porto Rico*);

(c) is levied alike on all property within Louisiana (*Porto Rico*); and

(d) is not a *tariff* duty levied before entry and delivery of the property to its owner, but is strictly an excise or internal revenue tax.

Strictly speaking, *Brown v. Maryland* has no application here; since there is not here, as there was there, any *discrimination* against goods brought in from another State.

THE DECISIONS FOLLOWING *BROWN V. MARYLAND* CLEARLY FALL INTO TWO STREAMS OF DECISION, AS POINTED OUT BY CHIEF JUSTICE TAFT IN *SONNEBORN V. CURETON*, SUPRA, 262 U. S. 506, VIZ., ONE LINE OF DECISIONS HEADED BY *LOW V. AUSTIN*, 13 WALL. 29, 32, RELATING TO THE EFFECT OF CLAUSE 2, SECTION 10 OF ARTICLE I OF THE CONSTITUTION, FORBIDDING ANY STATE WITHOUT THE CONSENT OF CONGRESS FROM LAYING ANY "IMPOSTS OR DUTIES UPON IMPORTS" FROM ANY FOREIGN COUNTRIES; AND ANOTHER DISTINCT LINE OF AUTHORITIES HEADED BY *WOODRUFF V. PARHAM*, SUPRA, 8 WALL. 123, RELATING TO THE POWER OF CONGRESS TO REGULATE THE CARRIAGE OF GOODS FROM ONE STATE TO ANOTHER UNDER THE COMMERCE CLAUSE, CLAUSE 3 OF SECTION 8, ARTICLE I OF THE CONSTITUTION.

The decisions relating to the prohibition against the States, under Clause 2 of Section 10 to "lay any imposts or duties on imports" from *foreign countries*, hold that that prohibition prevents the levying, not only of *tariff* duties, but also of *any imposts* of any kind whatever upon imports so long as they remain the property of the importer and in the original packages.

*But, quite to the contrary, the decisions relating to the power of Congress to regulate commerce between the States under the "commerce clause", Clause 3 of Section 8 of Article I, consistently hold that the States may levy internal revenue and excise taxes and other taxes on property brought in from other States, as soon as it has "come to rest" within the State; provided only, as above observed, that such taxes shall not be discriminatory, shall not be levied against such property because it has been brought into the State from another State, and that there shall be no prohibition of its sale or other transfer within the State. The mere fact that the property is of a kind not manufactured within the State does not prevent its being taxed like any other property within the State. For instance, Georgia may tax automobiles or oil, although no automobiles may be manufactured or oil produced within the limits of Georgia.*

*Texas Co. v. Brown, 258 U. S. 466, 476-77.*

*The taxes here in question conform to all of these rules.*

The only statutory prohibition or limitation by the Organic Act or any other act of Congress against or upon the legislative power of the Legislature of Porto Rico, is that it shall not levy *tariff* duties against property brought in from the United States or elsewhere. These taxes are not *tariff* duties; but internal revenue taxes. They are valid, and are enforceable against these petitioners.

## POINT II.

It is believed unnecessary to add anything to the statement of this point hereinbefore made (ante, "(2)", page 2), which is self explanatory. In view of the amendment there quoted of March 4, 1927, to Section 3 of the Organic Act of Porto Rico, it cannot now be properly said that the questions here presented are any longer of general public interest.

## POINT III.

*The questions here sought to be presented by these petitioners have now become moot, since the amendment of Section 48 of the Organic Act of Porto Rico, by Section 7 of the Act of March 4, 1927 (Pub. No. 797, 69th Cong.)*

*The Act of March 4, 1927.*

In the supplemental brief of counsel in support of the petition for writs of certiorari in these cases, counsel anticipates an objection to the granting of the writs, namely, the effect of Section 7 of the Act of Congress of March 4, 1927, amending Section 48 of the Organic Act of Porto Rico by adding thereto the following:

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

This Act was passed before the petitions for writs of certiorari were filed in these cases and after the Circuit Court of Appeals for the First Circuit had decided these cases (January 7, 1927) against the present petitioners.

Counsel for the respondent, Juan G. Gallardo, Treasurer, in four other tax injunction cases pending in the said Circuit Court of Appeals, on March 22, 1917, filed motions to dismiss the appeals on the ground of said Act of Congress of March 4, 1927 (see copy of motion in Appendix hereto). The said Court in its decision of one of said cases (*Juan G. Gallardo, Treasurer, appellant, v. Porto Rico Railway, Light and Power Company*, Case No. 2058, decided April 11, 1927, not yet reported) discussed said point as follows:

"It is contended that this Act destroys the jurisdiction otherwise inherent in the court below and in this court. We are unable to adopt that view. The interpretation of this Act falls under the general rule recently stated by the Supreme Court in *Fullerton v. Northern Pacific*, 266 U. S. 435, 437, as follows:

"It is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is necessary implication to that effect."

citing *Harvey v. Tyler*, 2 Wall. 328, 347; *Sohn v. Waterson*, 17 Wall. 596, 599; *Twenty Per Cent Cases*, 20 Wall. 179, 187; *Chee Heong v. United States*, 112 U. S. 536, 559; *Shushab v. Doyle*, 258 U. S. 529, 534; *Hopkins v. Lincoln Trust Co.*, 233 N. Y. 213.

We see nothing in this amendment indicating that Congress intended to apply it to pending cases. Nor do we think that the word "maintained" is to be construed to cover actions already instituted. Similar language has been held inapplicable to pending suits. *Mason v. Darden*, 2 W. H. & G. (Exch.) 21 (1848); *Knight v. Lee*, 1893, L. R. 1, Q. B. D. 41; *Harbank v. Inhabitants of Auburn*, 31 Me. 590 (1850); *Gumpper v. Waterbury Traction Co.*, 68 Conn. 424 (1896); *Smith v. Lyon*, 44 Conn. 175 (1876)."

Counsel in his supplemental brief in this Court (page 2) undertakes to state respondent's position with regard to the Act of March 4, 1927, as follows: "The reason assigned is that the new enactment is retroactive. There is no warrant for that interpretation." We are thoroughly in accord with counsel for the petitioners on the elementary doctrine as to the present and prospective effect in general of statutes.

We have never believed or asserted that the Act of March 4, 1927, is retroactive. Indeed, we do not see how that Act does or could have any retroactive effect. There is no question involved here of vacating any proceedings had prior to March 4, 1927. Our position is that on March 4, 1927, Congress said to the United States District Court in Porto Rico: "*Stop with these tax injunctions, stop in your tracks!*" Far from contending that the law is retroactive, we insist that it had a very present effect upon all such suits pending on March 4, 1927, or thereafter to be commenced. The power of that Court to enforce this particular remedy (injunction) in this class of cases was definitely taken away on March 4, 1927, and there being no saving clause that pending suits might be prosecuted to a definitive conclusion under the former power of the Court and on appeal, they must necessarily abate.

*In re Hall*, 167 U. S. 38.

*Hallowell v. Commons*, 239 U. S. 506.

*Federal Land Bank v. U. S. Natl. Bank* 13 F.(2d) 36 (1926).

15 Corp. Jur. 825.

All the cases involved in this petition for writs of certiorari were decided in favor of the respondent, Juan G. Gallardo, Treasurer of Porto Rico, by-both the District Court in Porto Rico and the Circuit Court of Appeals. Has this Court the

power now to reverse those decisions and direct the District Court in Porto Rico to grant a new trial or to take any other steps that would constitute a maintenance of the suits for injunction? Could the appellate courts by a mandate require the District Court in Porto Rico to exercise a jurisdiction expressly prohibited by the Act of March 4, 1927? Obviously not.

*Gorden v. United States*, 117 U. S. 697.

*U. S. v. McCrory*, 91 Fed. Rep. 295.

*Parr v. Colfax*, 197 Fed. Rep. 302.

It is contended, as a matter of construction, that the language "no suit . . . shall be *maintained*" in the Act of March 4, 1927, means only that "no suit . . . shall hereafter be *commenced*."

It is true that this restricted interpretation of the word "maintained" (for obviously, to maintain a suit it must be commenced) has been resorted to, as a matter of construction, in order to avoid a harsh and unjust result, which it was presumed was not within the intention of the legislative body. Such are most of the cases cited in the decision of the Circuit Court of Appeals above quoted.

In *Moon v. Durdan*, 2 W. H. & G. (Exch.) 21 (1848) the statute using that word not only prohibited every form of legal remedy for the enforcement of the right involved, but destroyed the right itself in express terms. To make the provision as to the remedy apply to suits previously brought and still pending would be giving a retroactive effect to the other part of the statute which declared the right itself null and void—and that result a divided Court held not to be the intention of Parliament.

So, too, in the case of *Knight v. Lee*, 1893, L. R. 1, Q. B. D. 41, the statute providing that "no action shall be brought or maintained to recover any such sum of money" also enacted that the contract itself "shall be null and void." As the Court said, "here the right accrued before the statute was passed," and held it was not the intention of Parliament to make the Act retroactive by cutting off suits already brought for the enforcement of the right.

So, too, in *Gumpper v. Waterbury Traction Company*, 68 Conn. 424, it was a substantive right that would have been impaired by making the statute involved apply to pending suits.

In all of these cases, therefore, the restrictive meaning of "commenced" placed on the word "maintained" has its justification in the presumed intention of the legislature not to impair or destroy retroactively some *vested substantive right*. Clearly, only some such exceptional circumstance could justify such an interpretation of the word "maintain" which, in its ordinary meaning, would include not only the institution of an action but its continuance as well.

See "Words and Phrases," under the word "maintain."

Vol. 5 (First Series).

Vol. 3 (Second Series).

Manifestly, the Act of Congress of March 4, 1927, is something wholly different from these statutes in which the word "maintained" was interpreted to mean only "hereafter commenced." The Act of March 4, 1927, does not impair or destroy any substantive right. Nor does the Act take away every form of legal remedy.

As this Court said in the case of *Hallowell v. Commonwealth*, 239 U. S. 506, regarding the statute there in question, it

"takes away no substantive right but simply changes the tribunal to hear the case."

These complainants must go into law instead of into chancery. The Act of March 4, 1927, simply reaffirms the purpose of Congress that U. S. R. S. 3224 shall be effective in Porto Rico, as in the Federal Government since 1866.

There is no question of the power of Congress to enact this statute. *No person has a vested right in any particular form of legal remedy.*

In the absence of any saving clause as to pending suits, in the Act of March 4, 1927, or of any crucial circumstance justifying the reading of a saving clause into the Act by interpretation, we respectfully submit that this petition should be denied for want of jurisdiction.

#### POINT IV.

Respondent, appellee in the Circuit Court of Appeals, and defendant in the District Court, insisted in each of those courts that a court of equity was without jurisdiction to enjoin the taxes here in question, both because these petitioners (plaintiffs and appellants in the lower courts) had and have an adequate remedy at law by paying the taxes and suing for their return under the "tax refund" Acts of Porto Rico; and also because, under Section 3224 of the Revised Statutes a Federal court might not enjoin Insular taxes levied under Federal (as contra-distinguished from State) authority by the federal court might not enjoin Insular taxes levied under Federal (as contra-distonguished from State) authority by the Legislature of Porto Rico, an instrumentality of Congress.

The Circuit Court of Appeals overruled those contentions and dealt with the cases on their merits, holding that there was jurisdiction in equity.

In case this court should decide to grant writs of certiorari to these petitioners, and thus open these cases for review in this Court, the respondent would desire leave to assign cross-errors on these questions.

#### CONCLUSION.

It is respectfully submitted that the petition for writs of certiorari in these cases should be denied.

GEORGE C. BUTTE,

*Attorney General of Porto Rico,*

WILLIAM CATIRON RIGBY,

*Lieutenant Colonel, Judge Advocate,*

*Attorneys for Respondent.*

May 6, 1927.

## APPENDIX.

Copy of motion of this respondent (appellant there) in the Circuit Court of Appeals, First Circuit, March 22, 1927, in four cases appealed from the United States District Court for Porto Rico, to remand them to the District Court to dismiss for want of jurisdiction, because of the amendment of Section 48 of the Organic Act of Porto Rico by Section 7 of the Act of March 4, 1927, prohibiting suits to restrain Porto Rican taxes from being "maintained" in the Federal District Court of Porto Rico.



## APPENDIX.

### UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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October Term, 1926

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"No. 2052.

GALLARDO vs. LA PLATA TOBACCO COMPANY.

No. 2053.

SAME vs. FAJARDO SUGAR COMPANY.

No. 2054.

SAME vs. FAJARDO SUGAR COMPANY.

No. 2058.

SAME vs. PORTO RICO RAILWAY, LIGHT & POWER COMPANY.

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### "MOTIONS, AND SUGGESTIONS IN SUPPORT OF IT"

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"Now COMES the said Juan G. Gallardo, defendant-appellant in the above cases, and invites the attention of this Honorable Court to the Act of Congress approved March 4, 1927, since these causes were argued and submitted in this Court, entitled:

"An Act to amend and reenact sections 3, 20, 31, 33, and 38 and 48 of the act of March 2, 1917, entitled, 'An act to provide a civil government for Porto Rico, and for other purposes,' as amended by an act approved June 7, 1924, and for the insertion of a new section in said act between sections 5 and 6 of said act, to be designated as '5a' of said act",

section 7 whereof amends Section 48 of said Organic Act of Porto Rico, among other things, by adding thereto the following:

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico."

"And thereupon, in view of said statute, this defendant-appellant now moves the Court to remand each of these cases to the District Court of the United States for Porto Rico, with directions to dismiss each of them for want of jurisdiction.

"And in support of this motion, defendant-appellant submits the appended suggestions.

"San Juan, Porto Rico, March 14, 1927.

"GEORGE C. BUTTE,

*Attorney General of Porto Rico.*

"WILLIAM CATIRON RIGBY,

*Lieutenant Colonel, Judge Advocate."*

"J. A. LÓPEZ ACOSTA,

*Of Counsel.*

#### "SUGGESTIONS IN SUPPORT OF THE FOREGOING MOTION.

"1. The act of Congress approved March 4, 1927, amending the Organic Act of Porto Rico, amends Section 48 of the Organic Act by adding the following sentence:

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be *maintained* in the District Court of the United States for Porto Rico."

"It will be observed that *the provision is against MAINTAINING the injunction suit, which covers every step in the suit from first to last.* (It is submitted that this statute does not really change the prior law, but is simply a definite expression by Congress of its intent that Section 3224, Revised Statutes, is in effect in Porto Rico, as heretofore argued by us in these cases).

"2. Each of these cases is purely a suit for an injunction. Each has no other purpose. The injunctions were granted by the District Court, and appeals were prayed and allowed by that Court to this Court.

"3. *An appeal (differently from a writ of error) is not a new suit.* It is a part of the proceedings in the original suit.

3 Corp. Jur., "Appeal and Error," sec. 34, page 320, and cases cited.

"The appeal is allowed by order of the trial court, and a further order of that court is necessary after receiving the mandate of this Court, whatever the decision of this Court may be. In any event, the United States District Court will be required to enter some further order in each of these cases, in accordance with this Court's mandate, either vacating its former decree, if that should be reversed by this Court, or else, in case of affirmance here, putting its former decree in execution and vacating the stay attendant upon the appeal.

"4. *But the entry of any such order by the District Court would be to 'MAINTAIN' this injunction suit; which is forbidden by Section 48 of the Organic Act as now amended on March 4, 1927. Therefore, the District Court would have no jurisdiction, under that statute, to enter any order whatever in the case upon the receipt of the mandate of this Court (except to dismiss the suit for want of jurisdiction). The entry of any other order would be to 'maintain' the suit; which is now beyond the power of the District Court.*

"5. *It follows that any decision by this Court on the merits would be a decision of a merely MOOT QUESTION; and not an exercise of the judicial power of the Constitutional courts of the United States.*

"6. Accordingly, it is respectfully submitted that this motion should be granted, and each of these causes remanded to the District Court of the United States for Porto Rico, with directions to that Court to dismiss each of these suits for want of jurisdiction.

"GEORGE C. BUTTE,  
*Attorney General of Porto Rico.*

"WILLIAM CATTRON RIGBY,  
*Lieutenant Colonel, Judge Advocate."*

"J. A. LÓPEZ ACOSTA,  
*Of Counsel."*

FILED

MAY 6 1926

In the Supreme Court of the United States

OCTOBER TERM, A. D., 1926.

No. [REDACTED] 214

ADOLFO VALDES, et al,

*Petitioner,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

No. [REDACTED] 215

FINLAY, WAYMOUTH & LEE, INC.,

*Petitioner,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

No. [REDACTED] 216

ANGEL ABARCA PORTILLA, et al,

*Petitioners,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI

WILLIAM CATRON RUBY,  
*Lieutenant Colonel, Judge Advocate,*  
*Attorney for Respondent.*

GEORGE C. BUTTS,  
*Attorney General of Porto Rico,*  
*Of Counsel.*



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# In the Supreme Court of the United States

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OCTOBER TERM, A. D., 1926.

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No. 1021

ADOLFO VALDES, *et al.*,

*Petitioner,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

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No. 1022.

FINLAY, WAYMOUTH & LEE, INC.,

*Petitioner,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

---

No. 1023.

ANGEL ABARCA PORTILLA, *et al.*,

*Petitioners,*

v.

JUAN G. GALLARDO, Treasurer of Porto Rico,

*Respondent.*

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI.

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### REASONS WHY WRIT OF CERTIORARI SHOULD NOT ISSUE.

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The petitioners show no substantial grounds for the issue of the writ under Rule 35—5—(b) of the Rules of this Court.

The only grounds stated by Petitioners are (Petition, p. 2) that:—

(a) "Some of the questions of federal law have not been but should be settled by this Court"; and

(b) "Others have been decided in a way believed to be in conflict with applicable decisions of this court."

*But neither of those propositions is substantiated by the petition or the brief in support of it.*

## I.

The contention sifts down to a claim that the excise and sales tax law of Porto Rico here in question (Act No. 85 of August 20, 1925; Laws of Porto Rico of 1925, pp. 584-662), is violative of the provision of Section 2 of the Organic Act of Porto Rico ("Jones Law", Act of Congress of March 2, 1917; 39 Stat. 952) "*that the rule of taxation in Porto Rico shall be uniform*", in that

(a) "*the taxes are discriminating in their incidence against articles imported into Porto Rico*" (Petition, Par. 5, page 4); and

(b) "*Certain exemptions are allowed by Section 85 of the Act* (Laws of 1925, *supra*, pp. 632-634).

*Confer*, also, Petitioner's "Brief", pp. 16-17.

Both of those arguments are well analyzed and disposed of by the Circuit Court of Appeals, First Circuit, in a recent opinion (per ANDERSON, J.; April 11, 1927; not yet reported) in two other cases arising under the same Act here in question (and involving also the similar prior Act;—Act No. 68 of July 28, 1923; Laws of Porto Rico of 1923, pp. 442-522), in which the appellant taxpayers were represented by the same Counsel appearing for the petitioners here. The opinion of the Circuit Court of Appeals in those cases,—*Sanchez Morales & Co., Inc. v. Gallardo*, and *Porto Rico Automobile Co. v. Same*, is printed in the Appendix hereto, *infra*, pp. 7-12.

It is submitted that in view of the clear analysis of the taxpayers' arguments there made by JUDGE ANDERSON, nothing substantial is left in the argument of petitioners here, except the bold claim made, on page 25 of petitioners' brief, that:—

"The question is thus squarely presented whether a legislature which is expressly required to impose taxes according to the rule of uniformity has the power to create exemptions." (See also Par. 7, pp. 5-6, of Petition.)

BUT THIS COURT HAS DIRECTLY ANSWERED THAT QUESTION.

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of the just adaptation of property to its burdens."

*Pac. Exp. Co. v. Seibert*, 142 U. S. 339, 351 (LAMAR, J.).

It is believed to be the settled rule of this court that "uniformity" does not require absolute equality of taxation under all circumstances; is not tantamount to "universality"; and does not prevent reasonable classification of either the property or the persons to be taxed, nor the allowance of reasonable exemptions.

*Louisiana v. Pilsbury*, 105 U. S. 278, 296.

*Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237-238.

*Home Ins. Co. v. New York*, 134 U. S. 594, 606.

*Pac. Exp. Co. v. Seibert*, *supra*, 142 U. S. 339, 350-352.

*Giesza v. Tiernan*, 148 U. S. 657, 662.

*Watson v. State Comptroller*, 254 U. S. 122, 124-125.

*Stebbins v. Riley*, 268 U. S. 137, 141-143.

*Swiss Oil Co. v. Shanks*, — U. S. — (February 21, 1927).

The provision in Section 2 of the Organic Act of Porto Rico that: "The rule of taxation in Porto Rico shall be uniform (39 Stat. 952) is only a paraphrase of the provision of the 14th Amendment securing to every person "the equal protection of the laws."

As applied to taxation, that Constitutional provision has been said by this Court to mean,

"that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

*Bell's Gap R. Co. v. Pennsylvania*, *supra*, 134 U. S. 232, 238 (BRADLEY, J.), quoting with approval, *Barbier v. Connolly*, 113 U. S. 27, 31 (FIELD, J.).  
*Confer*, also,  
*Pac. Express Co. v. Seibert*, *supra*, 142 U. S. 339, 342-3, 350-51.

## II.

Petitioners expressly admit ("Argument," p. 17, of Brief in support of Petition) that:

"The settled rule \* \* \* is succinctly stated in *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 516, in which this Court said:

"A state tax upon merchandise brought in from another State, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State'" (*italics ours*).

THERE IS NO SUCH DISCRIMINATION HERE. These taxes are valid under the rule of that case. It is submitted that that case is decisive of the validity of these taxes; and is controlling here.

## III.

These are companion cases to Nos. 1018, 1019, and 1020, in which petitions for certiorari were presented at the same time with these petitions (*confer* Petition here, par. 2, page 2, and "Brief," p. 16).

Since counsel for Petitioners here do not urge the questions presented in those cases, we do not here burden the court with further reference to them. They are dealt with in our brief in opposition to the granting of the writ in those cases.

## IV.

The effect of the Act of Congress of March 4, 1927 (Pub. No. 797, 69th Cong., S. 4247), amending Sections 3 and 48 of the Organic Act of Porto Rico (see par. 10, p. 7, Petition here; and Point V, pp. 29-33, of Petitioner's Brief in support), is likewise dealt with in our brief in opposition to granting the writs in said cases 1018, 1019, and 1020 in this court, to which the court is respectfully referred.

V.

In two of these cases (the first two in the caption, Nos. 1021 and 1022), a portion of the taxes involved were levied on merchandise imported from foreign countries, after it had come to rest in Porto Rico, but while (as plaintiffs claimed) it was still in the hands of the importers, in original packages.

Those taxes (relatively small in amount), the circuit Court of Appeals held invalid (16 F (2d), 545, at p. 549; R. 137, "III"); that court holding:—

"*Brown v. Maryland* is applicable to importations from foreign countries sold by the importers in the original packages, and the taxes as to such importations so sold must be enjoined. \* \* \* \* The right of Porto Rico to tax the sales of foreign importations is not greater than the corresponding right of a State."

It is believed that the Circuit Court of Appeals erred in that portion of its opinion and decree. That, for the purposes of these sales taxes, there is no just ground for any distinction between goods brought into Porto Rico from the United States, and those imported from foreign countries. That the Constitutional limitations on the rights of States do not apply to Congress; and that the question involved is simply of the intention of Congress as evidenced by the Organic Act of Porto Rico ("Jones Law") in connection with the earlier Act ("Foraker Law"), and the amendatory Acts.

*Confer:*

*Rafferty v. Smith, Bell & Co.*, 257 U. S. 226.

*United States v. Heinszen & Co.* 206 U. S. 370.

*Haavik v. Alaska Packers Assn.*, 263 U. S., 510.

*Alaska v. Troy*, 258 U. S. 101.

*Tiaco v. Forbes*, 228 U. S. 549.

*Jordan v. Roche*, 228 U. S. 436, 441.

*Dorr v. United States*, 195 U. S. 138.

*Sonneborn Bros. v. Cureton*, *supra*, 262 U. S. 506.

However, because of the small amount of sales taxes here involved on such goods imported from foreign countries, the Insular Government does not now desire, on that ground, to ask for a review of these decrees of the Circuit Court of Appeals.

But in case the writs of certiorari should be granted to these petitioners, so that the cases should be opened for review in

this Court, then the Respondent would desire leave to assign cross-errors in this Court, on the ground stated in this Point, as well as those mentioned in the next succeeding Point hereof.

## VI.

Respondent, appellee in the Circuit Court of Appeals, and defendant in the District Court, insisted in each of those Courts that a court of equity was without jurisdiction to enjoin the taxes here in question, both because these petitioners (plaintiffs and appellants in the lower courts) had and have an adequate remedy at law by paying the taxes and suing for their return under the "tax refund" Acts of Porto Rico; and also because, under Section 3224 of the Revised Statutes, a federal court might not enjoin Insular taxes levied under Federal (as contra-distinguished from State) authority by the Legislature of Porto Rico, an instrumentality of Congress.

The Circuit Court of Appeals overruled those contentions, and dealt with the cases on their merits, holding that there was jurisdiction in equity.

In case this Court should decide to grant writs of certiorari to these petitioners, and thus open these cases for review in this Court, the Respondent would desire leave to assign cross-errors on these questions, also.

## CONCLUSION.

It is respectfully submitted that the petition for writs of certiorari in these cases should be denied.

WILLIAM CATTRON RIGBY,  
*Lieutenant Colonel, Judge Advocate,*  
*Attorney for Respondent.*

GEORGE C. BUTTE,  
*Attorney General of Porto Rico,*  
*Of Counsel.*

## **APPENDIX**

**Opinion of the Circuit Court of Appeals, First Circuit,  
in Sanchez Morales & Co., Inc., v. Juan G. Gallardo,  
Treasurer of Porto Rico, and in Porto Rico Automobile  
Co., Inc., v. same; April 11, 1927, not yet reported.**



APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIRST CIRCUIT.

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OCTOBER TERM, 1926.

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No. 2003.

SANCHEZ MORALES & Co., Inc.,  
*Plaintiff, Appellant,*

v.

JUAN G. GALLARDO, Treasurer,  
*Defendant, Appellee.*

---

No. 2004.

PORTO RICO AUTOMOBILE CO., INC.,

v.

SAME.

---

APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE DISTRICT OF PORTO  
RICO.

---

BEFORE BINGHAM, JOHNSON AND ANDERSON, JJ.

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OPINION OF THE COURT.

April 11, 1927.

ANDERSON, J. These two tax cases are conceded by learned counsel for the appellants to be indistinguishable from 29 of the 43 cases disposed of in a single opinion of this court on January 7, 1927, 16 Fed. (2d) 545.

The court below sustained demurrers and dismissed the bills; which allege that the plaintiffs are dealers in motor

vehicles and accessories, pneumatic tires, phonographs, radio sets, pianos, pianolas, typewriters, safes, glass show-counters, cash registers and adding machines, all transported into Porto Rico from the United States; and that of these articles only glass show-cases are manufactured in Porto Rico.

Counsel now urge that this court was wrong in its expressed view, 16 Fed (2d) 545, that the West India Oil case, 6 Fed. (2d) 523, disposed of the minor contentions raised in the 29 cases and now raised in these two cases.

The first contention is stated as follows:

"The Act of 1923 discriminates against articles manufactured or produced outside of Porto Rico in that upon such articles the taxes are computed upon a higher basis of value than upon domestic articles; and such discrimination is an unlawful regulation of and burden upon interstate and foreign commerce.

This is plainly unsound. Goods imported from (say) New York are when landed in Porto Rico treated by the Tax Act precisely as though manufactured in Porto Rico. Transportation to Porto Rico of New York goods is a part of the basic cost in Porto Rico of the imported goods. The importer and the local manufacturer are both taxed on the basis of cost in Porto Rico plus a profit of 10 percent, unless adjusted to a lower rate under Sec. 6 of the Act. The proper comparison is not between manufacturing costs in New York,—followed perhaps by a sale in New York to the importer at a price increased by the manufacturer's profit,—and the manufacturing cost of goods produced in Porto Rico. When in Porto Rico,—whether manufactured in Porto Rico or in the States and transported to Porto Rico,—the first sale is taxed. There is no discrimination against goods produced in the States. The New York manufacturer can compete with the Porto Rican manufacturer only by putting his goods into Porto Rican market. The local manufacturer is entitled to such advantage as accrues from his remoteness from the large manufacturing centres. Whether the amounts of local competitive manufacturing is sufficient to make appellants' claim, even if found of any legal significance,—is, on this record, doubtful. But it is not sound.

Appellants' second contention is thus stated:

"The definition of the term *ad valorem* contained in section 6 of the Act of 1923 (substantially identical with section 4 of the Act of 1925) causes an inequality of valuation for the purpose of fixing the tax, and thus makes the statute operate unequally as between members of the same class and thereby causes, not only a lack of uniformity, but, also, a denial of the equal protection of the laws, in violation of the Organic Act of Porto Rico and the fourteenth amendment of the Constitution."

Section 6 reads:

"Section 6. Definition of the phrase *ad valorem*.—For the purposes of this Act the phrase *ad valorem* shall be construed to mean the cost of the article after it is in the possession of a person, plus a reasonable benefit to be estimated at ten percent over the amount of said cost, unless such person proves, to the satisfaction of the Treasurer of Porto Rico, that the profit obtained on such article is less than ten percent; Provided, That the word 'person' as used in this section shall be given the meaning given thereto in section 7 hereof."

The argument is that, as some sales may possibly be made at less than cost and others at a profit in excess of 10 percent, the necessary result is lack of the uniformity required by the Organic Act.

This contention is based on a misapprehension of the fundamental nature of the tax. It is not a tax on property or on profits. It is an excise tax levied on the "sale, use, consumption or exhibition in Porto Rico" of the named articles. There is no "classification" as the term is used in most of the cases cited and relied upon. In Title II,—entitled "Excise and License Taxes,"—Part I deals with Excise Taxes, in §20 with 53 subdivisions; Part II deals with "License Taxes," in §21 with 42 subdivisions. In §20, about 20 of the excise taxes are specific, *e. g.*, \$1 a liter on brandy; about 30 are *ad valorem*; a few are mixed. The *ad valorem* taxes are: at 5 percent on sales, etc., of 7 articles; at 10 percent, on 16 articles; others at 15, 30 and 40 percent. Perhaps even more varied are the license taxes imposed, each three months, on numerous kinds of manufacturers and dealers; some of them divided into as many as five classes, the gradation to be made by the

Treasurer (§23) "according to the relative importance of the establishment as measured by the volume of business transacted, irrespective of the net profit or gain derived therefrom, but with due regard to the business or industry to which it bears most intimate similarity."

Thus profits are expressly excluded as a basis for the license tax. All licenses of the same class pay the same license fees, even though doing unequal amounts of business or deriving unequal profits from the same volume of business.

Turning to the ad valorem excises, there is no classification of the various dealers and manufacturers affected; but all dealers in or manufacturers of the same articles are required to pay the same percentage on their sales. There is no discrimination between large and small, between citizens and foreigners, or other wise. The tax is uniform when the business conditions are uniform,—a result impossible of exact attainment.

It is of course true that, as about 90 percent of the base on which the tax is computed is the cost, the tax may affect differently dealers and manufacturers who buy or produce the same articles at different costs. The shrewd and successful buyer or manufacturer will pay a less tax because of his ability or good fortune as a buyer or manufacturer. And the ingenious and attractive seller may sell at a better profit than his less efficient competitor and thus feel the tax less. Of course competition will tend to drive competitors toward equality of selling price. But (to repeat) the tax is not on profits; it does not attempt to create equality in business or economic result; it is uniform in incidence when the business conditions are uniform. This is enough.

The provision for increasing the cost by a hypothetical 10 percent profit is, on analysis, of negligible significance. As noted above, the majority of the ad valorem excises are at 10 percent. Obviously, a 10 percent tax on cost plus 10 percent profit would be 11 percent of cost, or one percent more than the profit. All normal business would therefore be done on a profit of (perhaps) about 20 percent, leaving 9 percent net. The 40 percent tax on arms and ammunition would require a 44 percent mark-up to break even.

On the seven 5 percent excises, there is a remote possibility of an advantageous adjustment under §6 to less than a 10 percent

profit. A 5 percent tax on cost plus (say) a 5 percent profit would be 5.25 percent of cost as compared with 5.5 percent of cost if a 10 percent profit be assumed. A difference of  $\frac{1}{4}$  of one percent would not be enough to induce a dealer to scale his profits to 5 percent and then seek reduction of the tax under § 6.

For practical purposes the excises will be computed on cost plus 10 percent. At any rate, all the taxes imposed on the present plaintiffs and their competitors are 10 percent, requiring (as noted above) additions of 11 percent or more for business not headed for bankruptcy.

Of course dealers may, in closing-out or slaughter sales, sell at cost or less and yet be taxed on the original cost, even after obtaining the relief contemplated by § 6. Whether such victims of (theoretically) excessive taxation would be legally aggrieved is a question not presented on this record. Compare § 41, authorizing exemption when the property is destroyed or becomes unfit for sales. Certainly tax payers doing business along lines of normal profits cannot escape excise taxes on the theory that such excises bear too heavily on sellers at less than cost,—an unwholesome sort of competition entitled to no discriminating favor in public policy, as it certainly has none from dealers carrying on business with the usual and desirable motive of making a profit thereby.

Tax laws are practical undertakings. They deal with normal business enterprises. The requirement of uniformity does not extend to the utterly impractical limit of compelling mathematical or scientific equality of incidence. No property tax accomplishes that result. The owner of realty, unrented or leased to an irresponsible tenant, finds his tax a heavy burden, while his neighboring owner of property leased at a good and promptly paid rental finds the tax easy to pay. The shrewd buyer of foreign goods subject to an ad valorem import tax pays less tariff and thus adds to the margin between him and his less efficient competing importer. But these inequalities of result grow out of inequalities in business conditions and activities, not possible of control by law. They are unavoidable; they do not originate in the law. They are not cases of intentional and arbitrary discrimination, *Sunday Lake Iron Co. v. Wake-*

19

January Term, 1900

T. W. BARNETT, PLA.

v.

No. 21

John D. Callahan, Treasurer of Porto Rico

vs. United States District Court of Porto Rico

v.

No. 22

John D. Callahan, Treasurer of Porto Rico

vs. United States District Court of Porto Rico

v.

No. 23

John D. Callahan, Treasurer of Porto Rico

vs. United States District Court of Porto Rico

v.

No. 24

John D. Callahan, Treasurer of Porto Rico

vs. United States District Court of Porto Rico

v.

No. 25

John D. Callahan, Treasurer of Porto Rico

vs. United States District Court of Porto Rico

v.

No. 26

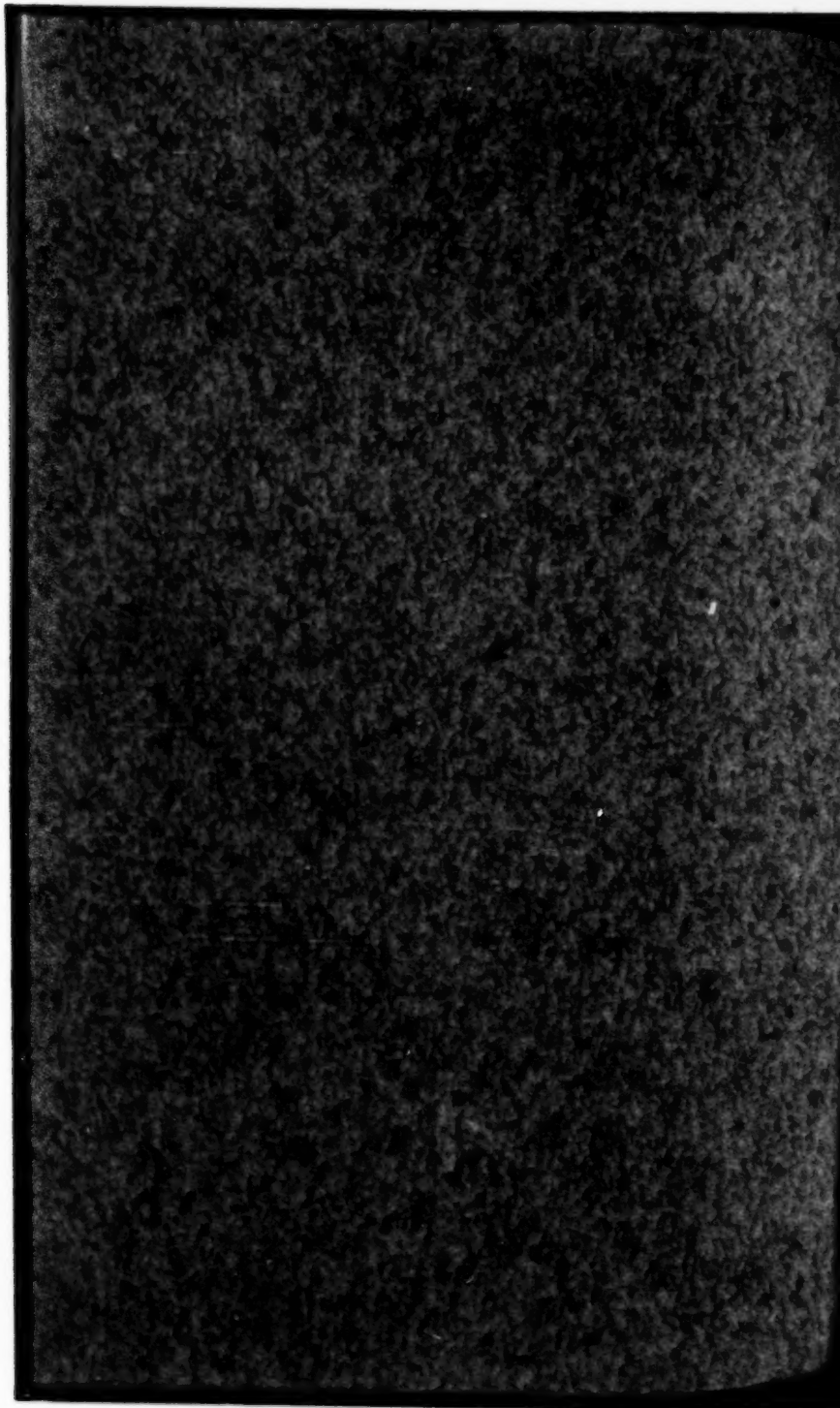
John D. Callahan, Treasurer of Porto Rico

vs. United States District Court of Porto Rico

THE ABOVE CASES, RESPECTIVELY, HAVE BEEN FILED FOR  
RECORD IN THE OFFICE OF THE CLERK OF THE DISTRICT COURT OF PORTO RICO  
THIS 10th DAY OF JANUARY, 1900.

CLERK OF DISTRICT COURT  
DISTRICT COURT OF PORTO RICO  
SAN JUAN, P. R.

JOHN D. CALLAHAN, TREASURER OF PORTO RICO  
SAN JUAN, P. R.



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# In the Supreme Court of the United States

OCTOBER TERM, 1927.

T. H. SMALLWOOD, <i>et al</i> ,	<i>Petitioners,</i>	} No. 211
v. JUAN G. GALLARDO, Treasurer of Porto Rico,	<i>Respondent.</i>	
ADOLFO VALDES ORDONEZ, <i>et al</i> ,	<i>Petitioners,</i>	} No. 212
v. JUAN G. GALLARDO, Treasurer of Porto Rico,	<i>Respondent.</i>	
INSULAR MOTOR CORPORATION	<i>Petitioner,</i>	} No. 213
v. JUAN G. GALLARDO, Treasurer of Porto Rico,	<i>Respondent.</i>	
ADOLFO VALDES, <i>et al</i> ,	<i>Petitioners,</i>	} No. 214
v. JUAN G. GALLARDO, Treasurer of Porto Rico,	<i>Respondent.</i>	
FINLAY, WAYMOUTH & LEE, INC.,	<i>Petitioner,</i>	} No. 215
v. JUAN G. GALLARDO, Treasurer of Porto Rico,	<i>Respondent.</i>	
ANGEL ABARCA PORTILLA, <i>et al</i> ,	<i>Petitioners,</i>	} No. 216
v. JUAN G. GALLARDO, Treasurer of Porto Rico,	<i>Respondent.</i>	

## BRIEF OF RESPONDENT

"On the sole question whether they have become moot by virtue of the Act of March 4, 1927, amending Section 48 of the Organic Act of Porto Rico."

## OPINIONS BELOW

The opinions of the United States District Court for Porto Rico in these several cases dismissing the various bills of complaint because of "adequate remedy at law," and also for want of equity, are not yet reported. They appear on pages 53, 71-73, 89, 90-105, and 106 of the printed transcript of the record filed here in cases Nos. 211, 212 and 213; and pages 44-59, 61-62, 80-81, 101, and 103-104 of the printed transcript of the record in cases Nos. 214, 215 and 216.

The opinions of the Circuit Court of Appeals, First Circuit, of September 25, 1926, on the original hearing, and of January 7, 1927, on rehearing, are reported in "*Porto Rico Tax Appeals*," 16 F. (2d) 545 et seq., and 16 F. (2d) 548 et seq., respectively. They also appear on pages 129-138 and 150-152 of the printed transcript of the record in cases Nos. 211, 212 and 213; and pages 116-124 and 136-138 in cases Nos. 214, 215 and 216.

## JURISDICTION

This court at the October term, 1926, on May 16, 1927, by identical orders in these several cases (then designated as cases Nos. 1018, 1019, 1020, 1021, 1022, and 1023 on the 1926 calender of this court) ordered that

"The petition for writs of certiorari in these cases is granted and the cases are set for hearing on the first day of next term, Monday, October 3 next, after the cases heretofore assigned for that day, on the sole question whether they have become moot by virtue of the Act of March 4, 1927, amending Section 48 of the Organic Act of Porto Rico."

## QUESTION PRESENTED

"the sole question whether they have become moot by virtue of the Act of March 4, 1927, amending Section 48 of the Organic Act of Porto Rico."

## STATUTES INVOLVED

(1) *Act of March 4, 1927, amending Section 48 of the Organic Act of Porto Rico:*

"Sec. 7. That section 48 of the said Act be, and the same is hereby, amended to read as follows:

'Sec. 48. That the Supreme and District Courts of Porto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the District Courts of the United States, and the District Courts may grant writs of mandamus in all proper cases.

*'That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico.'*" (*italics ours*)

Act of March 4, 1927, (44 Stat. Chap. 503, pp. 1418, 1421).

(2) *Revised Statutes, Section 3224:*

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."  
(U. S. Rev. Stat., Sec. 3224.)

(3) *Organic Act of Porto Rico,—"Jones Law."*

"Sec. 9. That the statutory laws of the United States not legally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws." (39 Stat. Ch. 145, pp. 951, 954.)

"Sec. 40. That the judicial power shall be vested in the courts and tribunals of Porto Rico now established and in operation under and by virtue of existing laws. The jurisdiction of said courts and the form of procedure in them with the various officials and attaches thereof, shall continue to be as now provided until otherwise provided by law: *Provided, however,* That the Chief Justice and the Associate Justices of the Supreme Court shall be appointed by the President, by and with the advice and consent of the Senate of the United States, and the Legislature of Porto Rico shall have authority, from time to time as it may see fit, not inconsistent with this Act, to organize, modify, or rearrange the courts and their jurisdiction and procedure, except the District Court of the United States for Porto Rico." (39 Stat. 965.)

"Sec. 41. That Porto Rico shall constitute a judicial district to be called 'the District of Porto Rico'. The President, by and with the advice and consent of the Senate, shall appoint one district judge, who shall serve for a term of four years and until his successor is appointed

and qualified, and whose salary shall be \* \* \* . The district court for said district shall be called 'the District Court of the United States for Porto Rico', and shall have power to appoint all necessary officials and assistants, including the clerk, \* \* \* . *Such district court shall have jurisdiction of all cases cognizable in the district courts of the United States, and shall proceed in the same manner. In addition said district court shall have jurisdiction for the naturalization of aliens and Porto Ricans, and for this purpose residence in Porto Rico shall be counted in the same manner as residence elsewhere in the United States. Said district court shall have jurisdiction of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a State, Territory or District of the United States not domiciled in Porto Rico, wherein the matter in dispute exceeds exclusive of the interest or costs the sum of \$3000, and of all controversies in which there is a separable controversy involving such jurisdictional amount and in which all of the parties on either side of such separable controversies are citizens or subjects of the character aforesaid; Provided, That nothing in this Act shall be deemed to impair the jurisdiction of the District Court of the United States for Porto Rico to hear and determine all controversies pending in said court at the date of the approval of this Act. Upon the taking effect of this Act the salaries \* \* \* ."* (39 Stat. 965-966.) (*Italics ours.*)

"Sec. 42. That the laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters, or proceedings as between the courts of the United States and the courts of several States shall govern in such matters and proceedings as between the District Court of the United States and the courts of Porto Rico. Regular terms of said United States District Court shall be held at \* \* \* . All pleadings and proceedings in said court shall be conducted in the English language. The said district court shall be attached to and included in the First Circuit of the United States, with the right of appeal and review by said Circuit Court of Appeals in all cases where the same would lie from any district court to any Circuit Court of Appeals of the United States, and with the right of appeal and review directly by the Supreme Court of the United States in all cases where a direct appeal would lie from such district courts." (39 Stat. 966.)

"Sec. 43. That writs of error and appeals from the final judgments and decrees of the Supreme Court of Porto Rico may be taken and prosecuted to the Circuit Court of Appeals for the First Circuit and to the Supreme Court of the United States as now provided by law." (39 Stat. 966.)

(4) *The Porto Rican statutes providing for recovery of taxes paid under protest.*

These "Tax Refund Acts" are in the Appendices hereto (*infra*, Appendices I and II, pp. 35-50).

### STATEMENT

These cases are all suits in equity begun by the respective petitioners in the United States District Court for Porto Rico to enjoin this respondent, Treasurer of Porto Rico, from collecting taxes levied under Porto Rican statutes. In each case the District Court dismissed the bill of complaint, both because complainant had an adequate remedy at law (R. 89, 105, and 107, in cases Nos. 211, 212 and 213; R. 50-52, 59, 61, 63, 81, 101, 103, and 104, in cases Nos. 214, 215 and 216) by payment of the tax under protest and suit at law to recover the amount under the Porto Rican "Tax Refund Acts" (Acts of 1924 and 1925, *supra*; see Appendix II, *infra*, pp. 45-49), and also because on the merits the taxes were valid (R. 53, 71-73, 89-105, and 107, in cases Nos. 211, 212 and 213; R. 44-59, 61-62, 62-63, 80-81, 101, 103-104, and 105, in cases Nos. 214, 215 and 216).

Appeals were prosecuted to the Circuit Court of Appeals, First Circuit, by the various complainants (petitioners here), as well as by complainants in numerous other tax injunction cases in which the bills had likewise been dismissed by the District Court, and forty-three of the cases, including these six, were argued and decided together by the Circuit Court of Appeals under the title "Porto Rico Tax Appeals" (16 F. (2d) 545; rehearing, *ib.* 548). In its original opinion, September 25, 1926 (16 F. (2d) 545) that court (*ib.*, at p. 548),

"reached the conclusion that all these cases should be remanded to the District Court of Porto Rico with instructions to dismiss them for want of equitable jurisdiction, without prejudice to the right of the appellants to

bring actions at law in accordance with the provisions of the act" (of Porto Rico) "of June 23, 1924, and the amendments thereto."

But on rehearing that court decided the cases on the merits (16 F. (2d), *supra*, at pp. 548-549), upholding the validity of the taxes (except as to those levied on "importations from foreign countries sold by the importers in the original packages"), and saying as to the question of adequate remedy at law:

"The question of jurisdiction in equity turns entirely upon the construction to be given to the Porto Rican legislation of 1924, Act No. 9, and 1925, Act No. 84. This court does not now decide that under that legislation actions at law to recover taxes paid under protest may not be maintained in the Federal court. But whether, as against objection such jurisdiction can be sustained, is not entirely plain. The legislature of Porto Rico might well make it plain, as did the legislature of Massachusetts, by a simple statute quoted in *Long v. Norman* (C. C. A.) 289 F. 5, 8.\* Apart from this doubt (*Dawson v. Kentucky Distilleries Co.*, 255 U. S. 288, 296), the remedy at law is inadequate. For the taxes in question must be paid monthly and the protesting tax payer must within thirty days after each payment bring his suit at law against the treasurer. This involves a multiplicity of suits by the same party to enforce the same right, \* \* \* .

Jurisdiction in equity must be sustained." (*Porto Rico Tax Appeals*, *supra*, 16 F. (2d) 545, 549).

It will be observed that these suits were commenced and decided, both in the District Court and in the Circuit Court of Appeals, before March 4, 1927, the date of the Act of Congress amending Section 48 of the Organic Act of Porto Rico by providing "that no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico" (Act of March 4, 1927, *supra*, 44 Stat. 1421); but that the three months' time allowed by the Jurisdiction Act of February 13, 1925, within which to petition this court for writs of certiorari, had not yet expired when the Act of March 4, 1927, was approved (the opinion of the Circuit

\* Since done.—Act No. 8, of April 19, 1927. Laws of Porto Rico, 1927, pp. 122-124 (Appendix I, pp. 35-37, *infra*).

Court of Appeals on rehearing having been entered on Jan. 7, 1927; 16 F. (2d) 545, 548, *supra*) and the final judgments of that court the same day (R. 154, in Cases Nos. 211, 212 and 213; R. 140, in Cases Nos. 214, 215 and 216). In other words, the amendatory act of March 4, 1927, was passed less than two months after the entry of the final decrees in the Circuit Court of Appeals; and more than a month (one month and three days) before the expiration of the time for petitioning this court for writs of certiorari.

Afterwards on April 4, 1927,—one month after the approval of the amendatory act of March 4, 1927,—these petitions for certiorari were filed in this court.

#### *History of the controversy*

Prior to the passage of the amendatory act of March 4, 1927, here in question, it had been the contention of the Porto Rican Government that the Federal District Court of Porto Rico could not,—or, in any event, ought not,—to take jurisdiction in equity on bills for injunction to restrain the Porto Rican Government from collecting its taxes; because (a) the taxpayers had an adequate remedy at law, under the Porto Rican "Tax Refund Acts" of 1924 and 1925 (*infra*, pp. 45-49, Appendix II hereto), by paying the taxes under protest and suing at law for their refund with 6% interest, either in the insular courts or in the Federal District Court; and (b) also because Section 3224, U. S. Revised Statutes, prohibiting suits from being maintained in any court, for the purpose of restraining the assessment or collection of any tax, is in force in Porto Rico, under the provisions of Section 9 of the "Jones Law", the Organic Act for that island; Rev. Stat., Sec. 3224, being one of the "statutory laws of the United States not legally inapplicable."

As to the question of "adequate remedy at law", the Insular Government's position was fully stated in its brief on rehearing in the Circuit Court of Appeals in these cases. Without here attempting to recite it, the portion of that brief relating to this question is reprinted in Appendix IV hereto (*infra*, pp. 63-85).

As to the applicability in Porto Rico of Section 3224, U. S. Revised Statutes, the position of the Insular Government was stated to the Committee on Insular Affairs of the House of

Representatives in a letter from the Secretary of War, quoted by the Chairman of the Committee on the hearing May 11, 1926 (Hearings, Com. on Insular Affairs, 69th Cong., H. R. 4085 and H. R. 11846, May 4, 5 and 11, 1926, p. 63; Appendix VI, *infra*, p. 95), as follows:

"In certain tax cases, now pending in the Circuit Court at Boston the Attorney General of Porto Rico has pleaded that Section 3224 of the Revised Statutes is now in effect in Porto Rico. Unless the proposed bill is passed at this session, this question will probably be decided before the next session of Congress."

The following September,—September 25, 1926,—the Circuit Court of Appeals in its opinion on the original hearing in these cases, said (16 F. (2d) 545, 548, *supra*) as to this question:

"(2) The interference of the courts of the United States by injunction with the collection of taxes by a State or with its administration of matters of internal police can only be justified in a plain case not otherwise remediable. *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269, 273. See, also, *Long v. Norman, et al*, 289 Fed. 5, a case in this circuit.

"(3) It was the purpose of the Foraker Act (Comp. Stat. Sec. 3747, *et seq.*) and the Jones Act (Comp. Stat. Sec. 3803a, *et seq.*), which succeeded it, to confer sovereignty upon Porto Rico and an autonomy similar to that of the States. *Gromer v. Standard Dredging Co.*, 224 U. S. 362; *Porto Rico v. Rosaly*, 227 U. S. 270."

"The right to tax, for the purposes of government, one of the attributes of sovereignty, was conferred upon Porto Rico by Congress, and there is a stronger reason for applying the above rule to Porto Rico than to the States, in order that it may not be hampered and obstructed in raising revenue for the administration of its government. Congress has recognized the necessity of preventing the embarrassment of the United States in the collection of taxes assessed under the internal revenue laws by enacting Section 3224, Revised Statutes (Comp. Stat. Sec. 5947), providing that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.'"

"While we think this section is not applicable to Porto Rico, as pressed upon us in argument, yet, the principle involved is, and there are as strong reasons for its application to Porto Rico as to the United States." (*Italics ours.*)

In its opinion on re-hearing (16 F. (2d) 548-550, *supra*), that court, however, did not notice this question.

The argument on behalf of the Porto Rican government on this point is stated in the extract from the brief filed in the Circuit Court of Appeals in these cases by this respondent, appellee there, reprinted in Appendix VII hereto, *infra*, pp. 98-102.

#### *Congress intervenes*

That being the situation, and while those contentions between the Insular Government on the one hand, and the taxpayers on the other hand, as to the jurisdiction in equity of the Federal District Court of Porto Rico on bills for injunction to restrain the collection of insular taxes, were still pending and undetermined, not yet having reached this court, the Congress intervened with the amendment of March 4, 1927, to the Organic Act, saying, explicitly,

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico." (44 Stat. *supra*, 1421.)

The debate in the Senate, February 28, 1927, upon this clause of the Act (Vol. 68, Cong. Rec., pp. 5025-2026) is printed in Appendix V hereto (*infra*, pp. 86-89).

The statements of Governor Towner of Porto Rico, of Major General McIntyre, Chief of the Bureau of Insular Affairs, and of Hon. Felix Cordova Davila, Delegate in Congress from Porto Rico, himself a member of the Committee, on the hearings before the House Committee on Insular Affairs, May 4, 1926 (Hearings before H. R. Com. on Insular Affairs, 69th Cong., 1st Sess., on H. R. 4085 and H. R. 11486, May 4, 5 and 11, 1926, pp. 5, 6, 8-9, 10-11, 63-65) as to the purpose of this amendment, are in Appendix VI (*infra*, pp. 90-97).

#### RESPONDENT'S POSITION

*It is the position of the Porto Rican Government that:*

1. The Act of March 4, 1927, really makes no change whatever in the procedure or in the jurisdiction of the court. It is

merely an express declaration or direction by Congress that the rule of Section 3224, Revised Statutes, is applicable in Porto Rico;—which, respondent submits, was already the case under Section 9 of the Jones Law.

2. If the Act of March 4, 1927, be held to be really a change in the antecedent law, then it is a modification,—a diminution,—of the jurisdiction theretofore granted to the District Court of the United States for Porto Rico by Section 41 of the Organic Act, the "Jones Law"; and is to that extent an amendment of Section 41, with which it must be read. It is immaterial that it is, in form, an amendment of Section 48 of the same Act. Upon such diminution of,—or withdrawal of,—the jurisdiction of the court, all pending cases necessarily fall, there being no saving clause in the Act.

3. These cases are necessarily within the rule of Section 3224, Revised Statutes,—now explicitly declared by Congress by the Act of March 4, 1927, to bind the District Court for Porto Rico, because:

A. There are no unusual circumstances about these cases and no undue hardships upon the taxpayer involved in seeking relief in the Insular courts, or in paying the tax under protest and then suing for refund either in the Insular courts or in the Federal District Court for Porto Rico, and, therefore, there is nothing to take these cases out of the operation of these Acts; even if an implied exception could be here admitted, such as this court has admitted to the operation of Section 3224, Revised Statutes, as applied to the constitutional courts of the United States.

B. But such an implied exception is not here applicable, since the District Court of the United States for Porto Rico is not a constitutional court wielding "the judicial power of the United States"; but is merely one among the territorial courts for Porto Rico established by Congress. It is, like the other territorial courts, but the creature of Congress, exercising such powers and only such powers (whether judicial, legislative or administrative) as the Congress may have granted it.

4. Appellants have no vested right in any particular procedure. The jurisdiction of the courts may be changed at any

time pending the suit (or while the suit is pending on appeal or writ of error, or other method of review); and the final judgment must be determined by the law governing the jurisdiction of the court and the procedure at the time it is entered; not by the law as it stood when the suit was begun.

A. No vested right of appellants is affected. Their only "right",—as contradistinguished from procedure,—is to have a reasonable opportunity to test the validity of the taxes of which they complain. This right remains unaffected. They may either (1) pay the taxes under protest and sue for their refund with interest at 6%, either in the District Court of the United States for Porto Rico or in the Insular courts; or else they may (2) file a bill for injunction, or such other equitable remedy as they may claim, in the Insular courts of Porto Rico, which are also territorial courts of the United States established by Congress by the same Organic Act, "Jones Law", by which the so-called Federal District Court for Porto Rico was established, having judges likewise appointed by the President for life by and with the advice and consent of the Senate; and with the same right of appeal to the Circuit Court of Appeals for the First District,—and the same right to petition this court for ultimate review by certiorari,—as exists to review judgments and decrees of the Federal District Court for Porto Rico.

Congress might, without invading any "right" of appellants, have entirely abolished the District Court of the United States for Porto Rico, leaving, as in the Philippines, only the territorial courts known as the Insular courts.

5. In any event appellants in these cases have an adequate remedy at law, so that there is no jurisdiction at all in equity; and, therefore, the question of the power to grant an injunction does not really arise in these cases.

## ARGUMENT.

### POINT I

The Act of March 4, 1927, really makes no change whatever in the procedure or in the jurisdiction of the court. It is merely an express declaration or direction by Congress that the rule of Section 3224, Revised Statutes, is applicable in Porto Rico;—which, respondent submits, was already the case under Section 9 of the Jones Law.

A. THE UNITED STATES DISTRICT COURT FOR PORTO RICO, SITTING IN EQUITY, HAS NO JURISDICTION TO INTERFERE BY INJUNCTION TO RESTRAIN THE COLLECTION OF TAXES LEVIED UNDER AN ACT OF THE LEGISLATURE OF PORTO RICO BECAUSE OF THE PROHIBITION EXPRESSLY STATED IN SECTION 3224, REVISED STATUTES OF THE UNITED STATES.

B. *Even if it should be held that Section 3224, Revised Statutes, is not, as a binding statute of the United States, in effect in Porto Rico under Section 9 of the Organic Act ("Jones Law", 39 Stat. 954), in any event "the principle involved is, and there are as strong reasons for its application to Porto Rico as to the United States."*

Section 3224, Revised Statutes, provides:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Section 9 of the Organic Act of Porto Rico provides (39 Stat. 554):

"Sec. 9. That the statutory laws of the United States not legally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws."

Section 3224, Revised Statutes, on its face, is not an internal revenue law. It is a general limitation on the equity powers of United States courts. It is, in fact, properly to be considered as a part of the Judicial Code. That it is in its nature "not legally inapplicable" in Porto Rico is undoubted. As said by the Circuit Court of Appeals in its original opinion of September 25, 1926, in these cases (16 F. (2d) 545, *supra*, at p. 548):

"There is a stronger reason for applying the above rule to Porto Rico than to the States, in order that it may not be hampered and obstructed in raising revenue for the administration of its government."

Some of these reasons were cogently stated to the House Committee on Insular Affairs during its hearings on the bill which afterwards became the Act of March 4, 1927, here in question, by Governor Towner of Porto Rico, by Major General McIntyre, Chief of the Bureau of Insular Affairs, and by Judge Davila, Delegate in Congress from Porto Rico (Hearings, H. R. 4085 and H. R. 11846, House Com. on Insular Affairs, May 4, 5, 11, 1926, pp. 5, 6, 8-9, 10-11, 63-65; Appendix VI hereto, *infra*, pp. 90-97); and by Senator Bingham in the debate in the Senate, February 28, 1927 (Vol. 68, Cong. Rec., pp. 5025-5026; Appendix V hereto, *infra*, pp. 86-89).

Without here repeating it at length, respondent submits to this court and relies upon the same argument in support of this point which he presented to the Circuit Court of Appeals in these cases, and which is printed in Appendix VII hereto, *infra*, pp. 98-102, to which respondent asks leave to refer, with the same effect as though he had here reprinted it in full.

## POINT II

Even if the Act of March 4, 1927, be held to be really a change in the antecedent law, then it is a modification,—a diminution,—of the jurisdiction theretofore granted to the District Court of the United States for Porto Rico by Section 41 of the Organic Act, the Jones Law; and is to that extent an amendment of Section 41, with which it must be read. *It is immaterial that it is in form an amendment of Section 48 of the same Act.*

Upon such diminution of,—or withdrawal of,—the jurisdiction of the court, all pending cases necessarily fall, there being no saving clause in the act.

"It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law."

*Railroad Co. v. Grant*, 98 U. S. 398, 401 (WAITE, CH. J.), citing the following prior cases in this court:  
*United States v. Boisdore's Heirs*, 8 How. 113;  
*McNulty v. Batty*, 10 How. 72;  
*Norris v. Crocker*, 13 How. 429;  
*Insurance Co. v. Ritchie*, 5 Wall. 541;  
*Ex parte McArdle*, 7 Wall. 514;  
*The Assessor v. Osbornes*, 9 Wall. 567;  
*United States v. Tynen*, 11 Wall. 88.

"Because of the act approved February 13, 1925 (43 Stat. 936), amending the Judicial Code, plaintiffs in error in their brief called attention to the question of jurisdiction of the District Court at the time judgment was rendered. Section 12 of that act (Comp. Stat. Supp. 1925, Section 991d), in so far as material here, reads thus:

'That no district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an act of Congress.'

The act went into effect on May 13, 1925. It has no saving clause of actions or suits pending at the time it became effective; and we think under the settled rule jurisdiction of the district court was ousted on May 13, it was without authority to proceed further, and the judgment it entered on May 15 was void."

*Fed. Land Bank v. U. S. Nat'l Bank*, 13 F. (2d) 36, 38 (C. C. A. 8th Circuit, May 25, 1926),

citing and relying upon:

*The Assessor v. Osbornes*, *supra*, 9 Wall. 567;  
*Railroad Co. v. Grant*, *supra*, 98 U. S. 398;  
*Hallowell v. Commons*, 239 U. S. 506;  
*Western Union Tel. Co. v. L. & N. R. R. Co.*, 258 U. S. 13.

"The case before us is a case of which, because of the fact that the appellants and appellees are citizens of the same State, we have no jurisdiction except under the act of 1833. And the act of 1866 declares that the act of 1833 shall not be construed so as to apply to such a case. This is equivalent to a repeal of an act giving jurisdiction of a pending suit. It is an express prohibition of the exercise of the jurisdiction conferred by the act of 1833 in cases arising under the internal revenue laws.

It is clear that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdic-

tion, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction." (*italics ours.*)

*Insurance Co. v. Ritchie*, *supra*, 5 Wall. (72 U. S.), 541, 544.

"We are unable to discover how a law which amends the act whereby jurisdiction was conferred differs from a repealing act such as the acts considered in the decisions above referred to. Such an amendment is, in fact, a repeal. It repeals *pro tanto* the grant of jurisdiction. It revokes a portion of the jurisdiction which was conferred. There is nothing in the language of the act in question to indicate a purpose to except from its operation cases which were then pending. In the absence of such a reservation, the intention of Congress is clear. It is that the statute shall read as amended, and as if it had been so enacted in the first instance. As amended the statute expresses the measure of the court's power over pending cases.

\* \* \* The amendment of June 27, 1898, does not, in terms, change the jurisdiction of the United States Circuit Court of Appeals. It relates only to the jurisdiction which had been conferred by the act of March 3, 1887, upon the district and the circuit courts, but its effects extend to all of the courts of the United States. This court has no power to review the judgment of the circuit court in a matter in which the latter has been divested of its jurisdiction. This court can act upon the circuit court only through its mandate. It will not issue its mandate to a court which has no power to enforce it."

*United States v. Kelly*, 97 Fed. 460, 462 (C. C. A. 9th Cir., Oct. 3, 1899; *italics ours.*)

"Jurisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell as the jurisdiction depended entirely upon the act of Congress."

*The Assessor v. Osbornes*, *supra*, 9 Wall. (76 U. S.) 567, 575.

"The effect of the passage of the repealing act was to take away the jurisdiction of the Court of Claims to pro-

ceed further in those cases which were founded upon the act thus repealed. This the Congress had power to do."

*Re Hall*, 167 U. S. 38, 42.

"The general rule was applied in those cases that if the law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law."

*Gurnee v. Patrick County*, 137 U. S. 141, 144 (FULLER, CH. J.).

"While the action was still pending and undetermined, by an act entitled 'An act to amend sections 1 and 2 of the act of March 3, 1887, c. 359' (Acts 1898, c. 503), it was enacted 'that section 2 of the act aforesaid \* \* \* be and the same is hereby amended by adding thereto at the end thereof the following: "The jurisdiction hereby conferred upon said circuit and district courts shall not extend to cases to recover fees, salary or compensation for official services of officers of the United States or brought for such purposes by persons claiming as such officers or as assignees or legal representatives thereof."' If we read together the original act and the amendment, it becomes clear that the intent of Congress by the amendment of 1898 was to limit the jurisdiction which it had conferred upon the district and circuit courts by the act of 1887. Instead of having, as theretofore, concurrent jurisdiction with the court of claims as to all matters named in section 1 of the act of 1887, cases brought to recover fees, salaries, or compensation for official services of officers of the United States were to be excepted. To them the jurisdiction should no longer extend. *It is a withdrawal of authority for the courts to consider cases within the class to which it is provided the jurisdiction shall no longer extend, and as to them is a repeal of the act by which the jurisdiction was originally conferred. Insurance Co. v. Ritchie*, 5 Wall. 541; *Assessor v. Osbornes*, 9 Wall. 567. The law of 1898 contains no saving clause, and its effect, therefore, is to divest the court of authority over pending cases." (*italics ours*).

*Fairchild v. United States*, 91 Fed. 297, at pp. 297-298.

"The question arises, What is the effect of that statute upon the appeal in this case? The contention is made that it has no application to a case which was begun before the date of the statute. But we do not think so. There is in the statute no clause reserving jurisdiction as

to pending cases, and the meaning of the statute is clear that exclusive jurisdiction is given to the Secretary of the Interior of all cases where an Indian, \* \* \*. That construction being given, *the statute deprived the circuit court of jurisdiction to entertain an action such as here under consideration, and thereby as a necessary incident, it took away the jurisdiction of this court to entertain an appeal from the decree of the circuit court, sued out after the statute went into effect, and this for the reason that the act deprives this court of the power to enforce any judgment it may render on an appeal.*" (*italics ours.*)

*Parr v. Colfax*, 197 Fed. 302, 304 (C. C. A. 9th Circuit, July 15, 1912),

cited with approval by this court in

*Hallowell v. Commons*, *supra*, 239 U. S. 506, 509 (HOLMES, J.)

See also to the same effect:

*Hollingsworth v. Virginia*, 3 Dall. 378, 382;

*Bank of Hamilton v. Dudley*, 2 Peters 492, 523-524 (MARSHALL, CH. J.);

*South Carolina v. Gaillard*, 101 U. S. 433, 437 (WAITE, CH. J.);

*Hallowell v. Commons*, *supra*, 239 U. S. 506, 508-509;

*Western Union Tel. Co. v. L. & N. R. Co.*, 258 U. S. 13, 18-22 (McKENNA, J.);

1 Lewis' Sutherland Statutory Construction (2d Ed), Sec. 285, pp. 550-554;

6 R. C. L. Sec. 311, and cases cited;

15 Cor. Jur., "Courts," Sec. 140, p. 825, and cases cited in note 90;

Cooley's Constitutional Limitations (8th Ed.), Vol. II, pp. 787-790.

"The bringing of suit vests in a party no right to a particular decision; and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered. \* \* \*. And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered."

2 Cooley, Const. Lim., *supra* (8th Ed.), pp. 789-790.

"Powers derived wholly from a statute are extinguished by its repeal. \* \* \* If a proceeding is in progress *in fieri* when the statute is repealed and the powers it confers cease, it fails, for it cannot be pursued. \* \* \* If there has been a change or alteration or repeal of the law applicable to the rights of the parties, after the rendition of judgment, and pending an appeal, the case must be heard and decided in the appellate court, according to the existing law. \* \* \* While a case was pending on writ of error the statute on which the jurisdiction of the lower court depended was repealed. The court inadvertently reversed the judgment and remanded the cause. On its attention being called to the statute it recalled the mandate, set aside the judgment of reversal and dismissed the writ of error." (United States v. Kelly, *supra*, 97 Fed. 460, 462.) "*Where a jurisdiction conferred by statute is prohibited by a subsequent statute, or the law conferring it is repealed, the jurisdiction ceases and causes pending at the time fail, and no costs are recoverable by either party unless saved by provisions of the repealing law. If pursued the proceedings will be void. \* \* \*. Jurisdiction may be taken away by repeal of the statutes conferring it by necessary implication as well as by express words.*" (*italics ours*).

*1 Lewis' Sutherland on Statutory Construction (2d Ed.) supra, Sec. 285, pp. 550-554, citing many authorities in the notes.*

Those decisions of this court, and of circuit courts of appeal based upon this court's opinions, are on all fours with the situation here presented; and, it is submitted, are conclusive here.

The jurisdiction of the United States District Court for Porto Rico is derived wholly from a grant of power by Congress. Prior to the enactment of the amendatory act of March 4, 1927, that jurisdiction was derived wholly from Section 41 of the Jones Law, the Organic Act for Porto Rico (Ch. 145, 39 Stat., 951, 965). Its powers must be found within the four corners of that grant of jurisdiction. If it should be conceded for the moment, for the sake of argument, that notwithstanding Section 3224, Revised Statutes, that court prior to March 4, 1927, had power, under the general grant of jurisdiction given it by Section 41 of the Organic Act, to entertain a bill to enjoin the collection of Porto Rican taxes, then the amendatory act

of March 4, 1927, expressly prohibiting it from exercising that jurisdiction, was necessarily an amendment,—and to that extent a repeal,—of the prior statute, Section 41 of the Organic Act, establishing the jurisdiction of the court; and hence, there being no saving clause in the amendatory act of March 4, 1927, upon such repeal (*modification, amendment*) of the law, thus expressly withdrawing such jurisdiction, all pending cases "fell with the law," as repeatedly held by this court in the cases cited.

As was said by this court in *Railroad Co. v. Grant*, *supra*, answering the contention there made by counsel that it was not the intention of Congress to interfere with the jurisdiction in pending cases:

"Usually where a limited repeal only is intended, it is so expressly declared. Thus, in the act of 1875 (18 Stat. 316), raising the jurisdictional amount in cases brought here for review from the circuit courts, it was expressly provided that it should apply only to judgments thereafter rendered; and in the act of 1874 (*ib.* 27) regulating appeals to this court from the Supreme Courts of the Territories, the phrase is, 'that this act shall not apply to cases now pending in the Supreme Court of the United States where a record has already been filed.' *Indeed, so common is it, when a limited repeal only is intended, to insert some clause to that express effect in the repealing act, that if nothing of the kind is found, the presumption is always strong against continuing the old law in force for any purpose.*"

*Railroad Co. v. Grant*, *supra*, 98 U. S. 398, 402 (WAITE, CH. J.); recently quoted and followed in the Circuit Court of Appeals, 8th Circuit, in *Fed. Land Bank v. U. S. Nat'l Bank*, *supra*, 13 F. (2d) 36, 38.

The foregoing language of this court is particularly applicable here, in view of the fact that in Section 41 of the Organic Act conferring jurisdiction upon the District Court of the United States for Porto Rico in 1917, Congress had expressly inserted a proviso saving the jurisdiction over then pending cases, viz:

"*Provided*, That nothing in this act shall be deemed to impair the jurisdiction of the District Court of the United States for Porto Rico to hear and determine all con-

troversies pending in said court at the date of the approval of this act." (39 Stat. 965-966.)

Nevertheless, with that clause before them in Section 41 of the same act which they were amending, Congress in the amendatory act of March 4, 1927, saw fit not to include any *proviso* saving jurisdiction over pending cases. The necessary conclusion is that the Congress acted deliberately, intending instantly to cut off the jurisdiction of the court in such cases.

As said in our original brief herein in opposition to the petition for writs of certiorari in three of these cases (*Brief of Respondent in Opposition to Petition*, in cases Nos. 1018, 1019 and 1020, at the October Term, 1926,—now cases Nos. 211, 212 and 213,—p. 8), it was the manifest intention of this enactment that

"on March 4, 1927, Congress said to the United States District Court in Porto Rico: '*Stop with these tax injunctions, stop in your tracks!*'"

The reason is plain upon a perusal of the debate in the Senate and the statements before the House Insular Affairs Committee (Appendices V and VI, *infra*, pp. 86-89 and 90-97).

For example, see Senator Bingham's statement during the Senate debate:

"it has been possible and has proved an extremely dangerous thing in the government of Porto Rico for taxpayers to secure an injunction against paying Porto Rican taxes in the court of the United States, in the district court of the United States for Porto Rico, and thereby, instead of following our practice—which is to pay the tax first and then take an appeal—they do not pay the tax at all. They get injunctions against paying the tax; and I have seen in one of the publications the statement that at one time there was over \$2,000,000 of uncollected taxes held up by injunction. This amendment is to apply the same rule in Porto Rico that now applies on the continent of the United States."

"MR. WADSWORTH. May I ask the Senator from Connecticut, is this amendment perhaps the result of a decision or a series of decisions of the circuit court of appeals sitting at Boston?"

"MR. BINGHAM. No; it is caused by the fact that the district court of Porto Rico has repeatedly granted injunctions against the payment of taxes.

"MR. WADSWORTH. On the ground that they were illegally assessed?

"MR. BINGHAM. For one reason or another. The treasurer of Porto Rico has been unable to collect the taxes levied, as can be done in any other part of the United States. There the treasurer can collect, and then if there is any difficulty about it the matter is brought before a court; but under the present law, since the general statutes of the United States do not apply to Porto Rico, the taxpayer can get an injunction; and the taxes the collection of which was restrained by those injunctions amounted, at one time, to more than \$2,000,000.

"MR. WADSWORTH. Assuming that this amendment becomes law, what recourse has the taxpayer?

"MR. BINGHAM. The courts; the same that he has on the continent of the United States.

"MR. WADSWORTH. Which courts?

"MR. BINGHAM. The Porto Rican courts and the Federal court.

"MR. WADSWORTH. No; not the Federal court. That is the point. The Federal court is taken out of it.

"MR. BINGHAM. This is not a Federal tax. This is in regard to Porto Rican taxes.

"MR. SHORTRIDGE. Mr. President, if the Senator will yield, does the amendment deny to the courts their jurisdiction to grant an injunction as against illegal taxes?

"MR. BINGHAM. It will make the condition just the same as in the United States.

"MR. SHORTRIDGE. It, then, does give the court the jurisdiction to enjoin?

"MR. NORRIS. There is another provision, however. There is ample provision made, as I understand the law, for the return of taxes that are illegally paid.

"MR. BINGHAM. O, yes; there is no question about that.

"MR. NORRIS. But they can not get it by way of injunction.

"MR. SHORTRIDGE. In other words, they must pay under protest and then bring appropriate proceedings to recover?

"MR. BINGHAM. Yes; as in many of our States.

"The PRESIDENT pro tempore. The question is on agreeing to the amendment offered by the Senator from Connecticut.

"The amendment was agreed to."

Senate Debate, Feb. 28, 1927, Vol. 68, Cong. Rec. pp. 5025-5026.

### POINT III

**These cases necessarily fall within the rule of Section 3224, Revised Statutes,—now explicitly declared by Congress by the Act of March 4, 1927, to bind the District Court for Porto Rico; because:**

A. There are no unusual circumstances about these taxes and no undue hardships imposed upon the taxpayer in seeking relief in the Insular courts or in paying the tax under protest and then suing for refund either in the Insular courts or in the Federal District Court for Porto Rico; and, therefore, there is here nothing to take these cases out of the operation of these statutes (Rev. Stat. 3224, and Act of March 4, 1927), even if an implied exception could be here admitted in any event, such as this court has admitted to the operation of Section 3224, Revised Statutes, as applied to the constitutional courts of the United States.

B. But such an implied exception is not here applicable in any event; since the District Court of the United States for Porto Rico is not a constitutional court wielding "the Judicial Power of the United States," but is merely one among the territorial courts for Porto Rico established by Congress. Like the other territorial courts, it is but the creature of Congress exercising such powers, and such powers only (whether judicial, legislative or administrative) as the Congress may have granted to it.

Petitioners' argument (*Brief for Petitioners in cases Nos. 211, 212 and 213, "Point II"*, pp. 12-18; *Brief for Petitioners in cases Nos. 214, 215 and 216, "Point IV"*, pp. 13-18) that

"these cases come within the doctrine of *Hill v. Wallace*, 259 U. S. 44, and hence the act of March 4, 1927, does not prevent their maintenance even if that statute be

construed as applicable to suits brought prior to its enactment" ("Point IV", *Petitioners Brief, Cases Nos. 214-216*);

since

"in continental United States a Federal district court could enjoin collection of the taxes if the circumstances are 'extraordinary and entirely exceptional.'" (*Petitioners Brief, Cases Nos. 211-213, p. 12*),

is not here in point; because no such "extraordinary and entirely exceptional" burdens are imposed on the Porto Rican taxpayers in contesting the validity of these taxes on the merits, either (1) in the Insular courts in any form of procedure which they may see fit whether at law or in chancery, or (2) by payment of the taxes under protest and suit for refund either in the Insular courts or in the United States District Court for Porto Rico.

Without here repeating it at length, respondent relies upon the answer to this argument of the taxpayers, made by him as appellee in these cases in the Circuit Court of Appeals, which is reprinted in Appendix IV hereto (*infra*, pp. 84-85), to which respondent begs leave to refer. In connection therewith the regulations of the Porto Rican Treasury Department concerning the collection of these taxes,—of which, since they are recognized as part of the public law of the Island by the last clause of Section 94 of the Act of 1925 (*Porto Rican Laws of 1925, p. 648*), it is believed this court, as well as the Circuit Court of Appeals, may take judicial notice,—are printed in Appendix VIII, *infra*, pp. 103-105. The court's attention is particularly invited to the fact that the taxpayer is required to make his statement only *once a month*, at the end of the month, stating the articles sold during that month and the selling price; the tax is then computed by the Internal Revenue Division of the Insular Treasury Department, *and the tax thus computed is paid in one single payment*. The difficulties in paying under protest, supposed by counsel for petitioners (*Petitioners Brief, Cases Nos. 214-216, p. 16; Petitioners Brief, Cases Nos. 211-213, pp. 15-16*) are imaginary.

It may be added:

(a) Since the determination of these cases by the Circuit Court of Appeals, the Legislature of Porto Rico has adopted the suggestion made by that court in its opinion on the rehearing (16 F. (2d) *supra*, at p. 549) that:

"The Legislature of Porto Rico might well make it plain, as did the Legislature of Massachusetts by a simple statute quoted in *Long v. Norman* (C. C. A.) 289, Fed. 5, 8,"

by the enactment of Act No. 8 of April 19, 1927 (Appendix I *infra*, pp. 35-37), concerning the refund of taxes paid under protest, Section 3 whereof expressly provides (Laws of Porto Rico for 1927, p. 124; Appendix I *infra*, p. 36):

"A taxpayer who shall have paid under protest the whole or part of any tax may, within the term of one year from the date of payment, sue the Treasurer of Porto Rico in an Insular court of competent jurisdiction, or in the District Court of the United States for Porto Rico, to secure the return of the amount protested." (*italics ours*)

(b) Case No. 360 at the present term of this court, *Goodyear Tire & Rubber Co., Petitioner, v. Juan G. Gallardo, Treasurer of Porto Rico, Respondent*, in which the petitioner corporation is represented by the same counsel appearing for the petitioners in some of these cases, illustrates the practicability of the taxpayer paying these taxes and suing at law, in the Federal District Court of Porto Rico, for their return.

#### POINT IV

**Appellants have no vested rights in any particular form of procedure.** THE JURISDICTION OF THE COURTS MAY BE CHANGED AT ANY TIME PENDING THE SUIT (OR WHILE PENDING ON APPEAL OR WRIT OF ERROR OR OTHER METHOD OF REVIEW), AND ANY RIGHT TO FINAL JUDGMENT MUST BE DETERMINED BY THE LAW GOVERNING THE JURISDICTION OF THE COURT AND THE PROCEDURE AT THE PRESENT TIME; NOT BY THE LAW AS IT STOOD WHEN THE SUIT WAS BEGUN.

*A. No vested right of appellants is affected.*

Their only "right",—as contradistinguished from procedure,—is to have a reasonable opportunity to test the validity of the taxes of which they complain. This right remains unaffected. They may either (1) pay the taxes under protest and sue for their refund with interest at 6% either in the District Court of the United States for Porto Rico or in the Insular courts; or else they may (2) file a bill for injunction or such other equitable remedy as they may claim in the Insular courts of Porto Rico which are also territorial courts of the United States established by Congress by the same Organic Act, "Jones Law", by which the so-called Federal District Court for Porto Rico was established, having judges likewise appointed by the President for life by and with the advice and consent of the Senate and with the same right of appeal to the Circuit Court of Appeals for the First District,—and the same right to petition this court for ultimate review by certiorari,—as exists to review judgments and decrees of the Federal District Court for Porto Rico.

*Congress might, without invading any "right" of appellants, have entirely abolished the District Court of the United States for Porto Rico, leaving, as in the Philippines, only the territorial courts known as the Insular courts.*

The distinction between statutes changing the remedy, and those affecting vested rights, is well settled and is broad and plain.

A statute changing the remedy takes effect (in the absence of a saving clause) immediately. It operates on pending suits; and the procedure thereafter must be in accordance with the new law. But a statute affecting vested rights cannot operate retrospectively so as to change substantive rights already vested; and even in England, where the Parliament is not bound by any constitutional limitations, it will not be construed as intended to affect rights already vested, unless such a construction is required by the express words of the statute.

As to procedural changes, this court has said:

"It is well settled that, if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after."

*South Carolina v. Gaillard, supra*, 101 U. S. 433, 438.

This is the general rule recognized in the United States. For example, the Supreme Court of Illinois has said:

"When the law only affects the remedy or procedure, the rule in this State is that all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law, and without regard to whether the suit had been instituted or not, unless there is a saving clause as to existing litigation. *Chicago & Western Indiana R. R. Co. v. Guthrie*, 192 Ill. 579, 61 N. E. 658, and authorities there cited. The Legislature, however, cannot pass a retrospective or an *ex post facto* law impairing the obligation of a contract, nor can it deprive a citizen of any vested right by a later legislative act. *Dobbins v. First National Bank*, 112 Ill. 553."

*People v. Clark*, 283 Ill., 221; 119 N.E. 329, 330 (*Carter, Ch. J.*),

quoting with approval

*Cooley's Constitutional Limitations* (7th Ed.) 543, (8th Ed., *supra*, pp. 789-790),

that:

"The bringing of suit vests in a party no right to a particular decision, and his case must be determined on the law as it stands, and not when the suit was brought but when the judgment is rendered."

*Such a change in the procedure is in no proper sense a retrospective act.*

As this court said in *Railroad Co. v. Grant, supra*:

"It does not vacate or annul what has been done under the old law. It destroys no vested rights. \* \* \* But a party to a suit has no vested right to an appeal or writ of error from one court to another. Such a privilege once

granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary."

*Railroad Co. v. Grant*, *supra*, 98 U.S. 398, 401-402.

NEITHER HAS A PARTY ANY VESTED RIGHT IN ANY PARTICULAR FORM OF PROCEDURE; e.g., as here urged, in a proceeding in chancery by injunction. Taking away that form of remedy, by limitation of the jurisdiction of the court, in no way impairs any vested right of the taxpayer.

"RETROSPECTIVE LAW"—Definition.

As pointed out by petitioners themselves (*Petitioners' Brief*, Cases Nos. 211-213, pp. 9-10), a "retrospective law," properly speaking is one which

"takes away, or impairs, *rights vested*, agreeably to existing laws."

*Calder v. Bull*, 3 Dall. 386, 391.

"It is one which changes, or injuriously affects, a *present right*; by going behind it, and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued."

*Poole v. Fleezer*, 11 Peters 185, 198.

"Upon principle, every statute which takes away or impairs *vested rights* acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

*Society, etc., v. Wheeler*, 2 Gall. 105, 139; 22 Fed. Cas. No. 13,156, pp. 756, 767 (STORY, J.).

Thus, upon the definitions quoted by counsel for petitioners themselves, it is apparent that the Act of March 4, 1927, here in question, is not a retrospective law; since it in no wise affects any vested rights of these petitioners or anyone else, but merely changes the form of the remedy; and that, therefore, this respondent was correct in stating in his original brief in opposition to the petition for certiorari in these cases (Brief for Respondent

in Opposition, in Cases Nos. 1018-1020, October Term, 1926—now Nos. 211-213,—p. 8):

"We have never believed or asserted that the Act of March 4, 1927, is retroactive. Indeed, we do not see how that act does or could have any retroactive effect. There is no question involved here of vacating any proceeding had prior to March 4, 1927. Our position is that on March 4, 1927, Congress said to the United States District Court for Porto Rico: '*Stop with these tax injunctions, stop in your tracks!*' Far from contending that the law is retroactive we insist that it had a very present effect upon all such suits pending on March 4, 1927, or thereafter to be commenced. The power of that court to enforce this particular remedy (injunction) in this class of cases was definitely taken away on March 4, 1927, and there being no saving clause that pending suits might be prosecuted to a definitive conclusion under the former power of the court and on appeal, they must necessarily abate."

There is no ground for the criticism of this statement made on page 9 of the brief for petitioners in Cases Nos. 214-216.

As this court said in *Hallowell v. Commons*, *supra*, of the act there in question transferring from the courts to the Secretary of the Interior jurisdiction to ascertain the legal heirs of a deceased Indian, so also the act here in question

"takes away no substantive right, but simply changes the tribunal that is to hear the case. In doing so it evinces a change of policy. • • •

"The consideration applies with the same force to all cases and was embodied in a statute that no doubt was intended to apply to all, so far as construction is concerned.

"There is equally little doubt as to the power of Congress to pass the act so construed. *We presume that no one would question it if the suit had not been begun. It is a strong proposition that bringing this bill intensified, strengthened or enlarged the plaintiff's rights.* • • • The difficulty in applying such a proposition to the control of Congress over the jurisdiction of courts of its own creation is especially obvious." (*Italics ours*.)

*Hallowell v. Commons*, *supra*, 239 U.S. 506, 509.

This distinction between precedural changes on the one hand, and statutes attempting to affect retrospectively prior vested

rights on the other hand, is also fully recognized by this court in the case cited and relied upon by counsel for the petitioners (*Petitioners' Brief, Cases Nos. 211-213, p. 7; Petitioners' Brief, Cases Nos. 214-216, pp. 8, 10*), of *United States Fidelity Co. v. Struthers Wells Co.*, 209 U.S., 306, 316-317; where, however, this court held (pp. 316-317) that the statute there in question could not be construed as a procedural change merely, as was there contended by the plaintiff in error, because to do so would have affected prior vested substantive rights, saying (p. 315):

"It is admitted by the plaintiff in error that the act is not confined to procedure, but deals with substantive rights in some instances."

That case is not in point here, except as it is illustrative of this court's recognition of the difference between changes in procedure, and attempts to affect vested substantive rights retrospectively.

Its citation by petitioners also illustrates, however, the fallacy of their entire argument here; which wholly loses sight of the distinction between procedural changes,—changes in the form of the remedy or in the jurisdiction of the courts,—on the one hand; and attempts retrospectively to affect substantive vested rights, on the other.

*An examination of the cases cited by them,—both by petitioners in Cases Nos. 211-213, and also by petitioners in Cases Nos. 214-216,—shows that all of the cases upon which they rely under this head are cases of statutes affecting vested rights.*

They are not in point here.

The same is true of the cases cited by the Circuit Court of Appeals for the First Circuit, in support of its opinion, upon which these petitioners now rely, April 11, 1927, holding that this act of March 4, 1927, does not apply to pending suits (*Galardo v. Porto Rico Railway Light & Power Co.*, 18 F. (2d) 918, 925, cited in *Petitioners' Brief, Cases Nos. 211-213, pp. 4, 5; and in Petitioners' Brief, Cases Nos. 214-216, pp. 3, 4*).\*

\*On the merits, the *Porto Rico Railway Light and Power Co.* case was decided in favor of this respondent the Insular Treasurer, completely upholding the validity of the Porto Rican hydro-electric statute there in question (18 F. (2d) 918, 922-925.)

For example, the leading case there relied upon by the Circuit Court of Appeals, and likewise now cited and relied upon by opposing counsel here (*Petitioners' Brief, Cases Nos. 211-213, p. 7; Petitioners' Brief, Cases Nos. 214-216, p. 8*) of *Fullerton Co. v. Northern Pac. Ry. Co.*, 266 U.S. 435, 437, deals solely with "vested rights," and holds simply that Congress did not intend

"to revive actions against carriers when the period designated by the state statute for bringing them had expired during Federal control";

this court saying

"The Supreme Court of Minnesota held, rightly, we think, that the Transportation Act was not intended to revive or restore rights of action barred before it became effective."

*Fullerton v. North. Pac. Ry. Co., supra*, 266 U.S. 435, 437.

So also, the other recent case relied upon and quoted by petitioners (*Petitioners' Brief, Cases Nos. 211-213, pp. 6, 7, 8; Petitioners' Brief, Cases Nos. 214-216, pp. 6, 8*) of *United States v. St. Louis, etc., Ry. Co.*, 270 U.S. 1, is another "vested rights" case, holding merely that a statute of limitations (the Transportation Act of 1920, amending Par. 3, Sec. 16 of the Interstate Commerce Act) could not be applied retrospectively so as absolutely to bar a right of action existing at the time of its enactment, but which would have been barred by a literal application of the language of the act, because the right of action had arisen more than three years before.

Many cases are found in the books saving such vested rights of action, no matter how positive the terms of the new statute of limitations may be. They are in no way in point here.

No more are the English cases, upon which petitioners also rely, e.g., *Moon v. Durdan*, 2 Exch. 22 (1848) (*Petitioners' Brief, Cases Nos. 211-213, p. 5; Petitioners' Brief, Cases Nos. 214-216, p. 5*), and the other cases in that line. As pointed out in our original brief in opposition to the petition for certiorari in Cases Nos. 211-213 (1018-1020 at the October Term, 1926, pp. 9-10), those cases are also "vested rights" cases; and are in no way in point here.

The words of Mr. Justice McKenna, delivering the opinion of this court in *Western Union Tel. Co. v. L. & N. Ry. Co.*, *supra*, seem applicable:

"We have considered the cases and their incidents. It is not necessary to review them. There is a marked distinction between them and the case at bar. They all concerned the litigation of private rights and relations, and legislation which attempted to change those rights and relations by changing the conditions upon which they depended. The legislation in the case at bar has different purpose. It is directed to that which is conceived to concern the public interest; an exertion of power in the public interest of which the companies are the instruments or agents. It is not, therefore, within the principle of the cases cited against it. And, as we have seen, no rights had so far vested in the Telegraph Company as to preclude a change of policy or legislation which affected it."

*Western Union Tel. Co. v. L. & N. Ry. Co.*, *supra*, 258 U.S. 13, 20.

*No more had rights vested in these taxpayers, by the mere fact of the pendency of these suits.*

HAD CONGRESS, BY THE ACT OF MARCH 4, 1927, ENTIRELY ABOLISHED THE UNITED STATES DISTRICT COURT FOR PORTO RICO, WITHOUT ANY SAVING CLAUSE AS TO PENDING CASES, LEAVING, AS IN THE PHILIPPINE ISLANDS, ONLY THE INSULAR COURTS, IT WOULD HARDLY BE CONTENDED THAT PENDING CASES DID NOT FALL WITH THE LAW.

No claim of any "vested rights," because suits had been begun and were pending, would be seriously pressed to sustain them. *Yet the principle is exactly the same.* It is wholly immaterial that the amendatory act here took away merely a part of the jurisdiction of the District Court; instead of all of it. As to that part which is taken away, the jurisdiction is as wholly gone as though the entire court had been abolished. Pending cases dependent upon that portion of the jurisdiction of the court which has been taken away, fall just as completely as though the entire court had been abolished.

## POINT V

**In any event appellants in these cases have an adequate remedy at law; and therefore under Section 267 of the Judicial Code there is no jurisdiction in equity.**

In support of this point respondent submits to the court here, and relies upon, the same argument which he presented as appellee in the Circuit Court of Appeals. It is printed in Appendix IV hereto (*infra*, pp. 63-85), to which respondent asks permission to refer, without here repeating it at length.

It may be added, however, that, as hereinbefore pointed out (*ante*, pp. 6, 24), since the decision of these cases by the Circuit Court of Appeals, the Legislature of Porto Rico has re-enacted the "Tax Refund Acts" of that Island, in accordance with the suggestion made by the Circuit Court of Appeals (16 F. (2d) at p. 549, *supra*), so as expressly to provide for the right of a tax payer, having the requisite qualifications of citizenship, to bring such a suit in the United States District Court for Porto Rico (Act No. 8 of April 19, 1927, *Laws of Porto Rico for 1927*, pages 122-126; Appendix I, *infra*, pp. 35-37).

## POINT VI

**Appellants in these cases can suffer no danger or difficulty in paying the taxes under protest and suing for their refund under the Tax Refund Acts of Porto Rico.**

The difficulties apprehended by petitioners (*Petitioners' Brief, Cases 211-216*, pp. 11-12; *Petitioners' Brief, Cases 214-216*, pp. 21-22) are imaginary.

*It surely is not necessary for respondent to say to this court that the Insular authorities do not desire to trick petitioners out of their money, and would not be in position to do so, even if they wished. We submit that there is no possible way in which the order of the District Court, directing petitioners to deposit the moneys with the Clerk of that court, could be twisted into a payment to the Insular Treasury so as to start the statute of limitations run-*

ning from that date. It is not so on its face; and therefore is not so at law. It was not so intended; and therefore could not be so treated in equity. And this court will not presume that either the Insular courts or the Federal District Court, upon a suit for refund of the taxes, would take a position so wholly at variance with right and justice and with the intentions of the parties, and so wholly unjust to the tax payers.

As to this point also we desire to refer, without here repeating it at length, to what this respondent said in his brief as appellee in the Circuit Court of Appeals in these cases. It appears in Appendix IV hereto, *infra*, pp. 84-85.

### CONCLUSION

It is respectfully submitted that the United States District Court for Porto Rico was and is without jurisdiction of these suits, because (1) there is no jurisdiction in equity because of the adequate remedy at law; (2) under section 3224, Revised Statutes of the United States, in force in Porto Rico, there is no jurisdiction to enjoin the collection of Porto Rican taxes; and (3), in any event, if any such jurisdiction ever existed, it was withdrawn by the amendatory act of March 4, 1927, which, being an act affecting the jurisdiction of the court, applies to cases then pending.

WILLIAM CATTON RIGBY,

*Lieutenant Colonel, Judge Advocate,*

*Attorney for Respondent.*

GEORGE C. BUTTE,

*Attorney General of Porto Rico,*

*Of Counsel.*

## APPENDICES

APPENDIX I.—Present Tax Refund Law of Porto Rico.

APPENDIX II.—Former Porto Rican Tax Refund Acts.

APPENDIX III.—Opinions of Porto Rico Supreme Court concerning recovery of protested taxes.

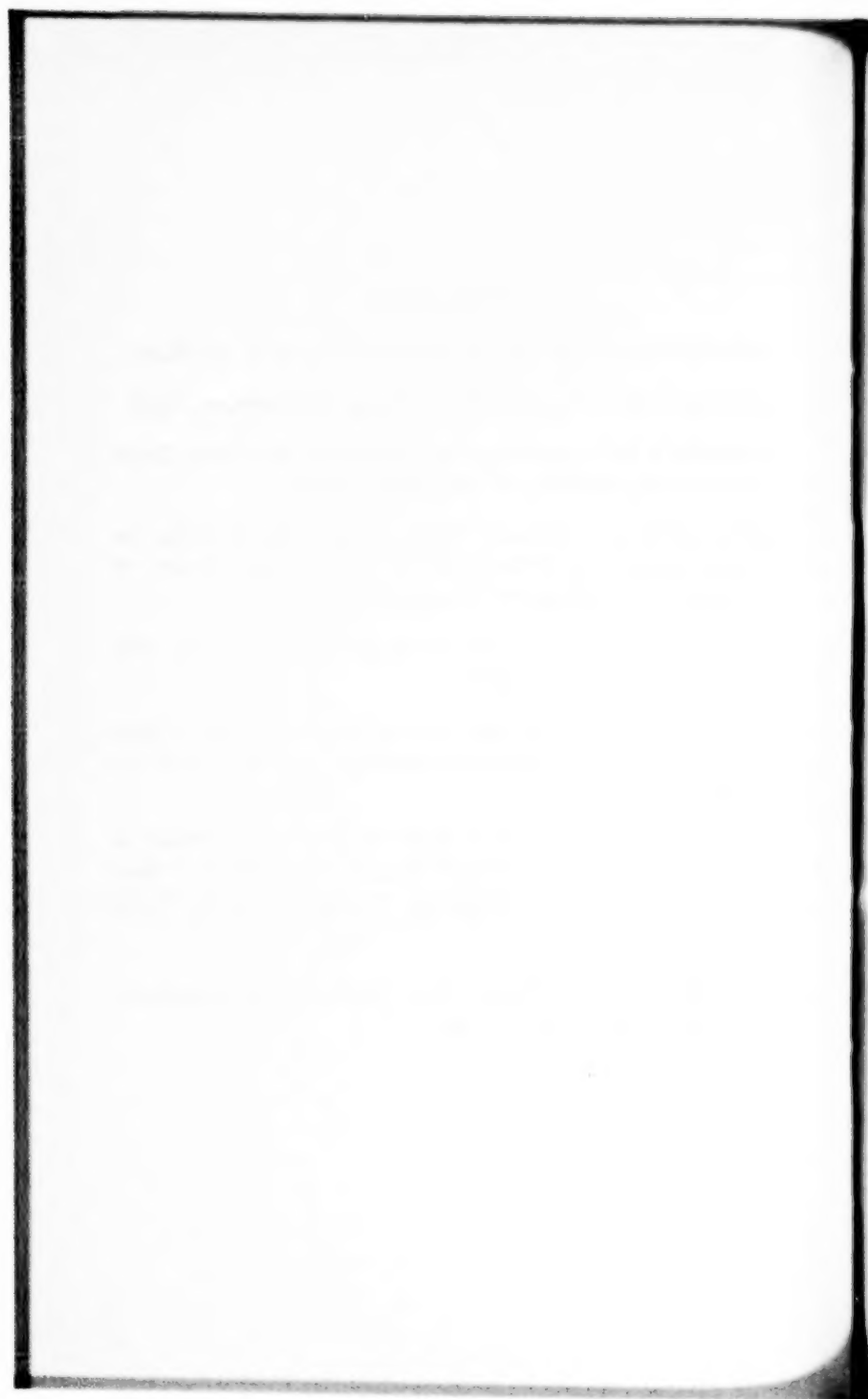
APPENDIX IV.—Extract from Respondent's Brief in these cases, on Rehearing in the Circuit Court of Appeals: —"Adequate Remedy at Law."

APPENDIX V.—Debate in the Senate, February 28, 1927 (68 Cong. Rec. 5025-5026).

APPENDIX VI.—Hearings before Insular Affairs Committee, House of Representatives, May 4, 5 and 11, 1926.

APPENDIX VII.—Extract from Respondent's Brief in these Cases, in the Circuit Court of Appeals: —"Section 3224, Revised Statutes, is applicable in Porto Rico."

APPENDIX VIII.—Porto Rico Treasury Regulations: Payment of the Sales Tax.



## APPENDIX I.

### PRESENT TAX REFUND LAW OF PORTO RICO.

#### AN ACT

PROVIDING FOR THE PAYMENT OF TAXES UNDER PROTEST; ESTABLISHING A PROCEDURE TO AUTHORIZE THE COLLECTION AND RETURN THEREOF; TO REPEAL ACT NO. 9 OF JUNE 23, 1924, AND ACT NO. 84, APPROVED AUGUST 20, 1925, AND FOR OTHER PURPOSES. (Laws of Porto Rico, 1927, pp. 122-126).

*Be it enacted by the Legislature of Porto Rico:*

Section 1.—Whenever a taxpayer believes that he should not pay any tax or part thereof, he shall, however, be obliged to pay the same in full upon request of the collector of internal revenue of his district, or of the official in charge of the collection of taxes, and shall he desire to make any claim, shall ask the said collector or the said official in charge of the collection of taxes, on making payment to endorse the tax receipt, specifically stating whether the said protest refers to the whole or to a part of the tax paid under protest, and setting forth the exact amount protested. The said endorsement shall be signed by the taxpayer and by the collector or officer in charge of the collection of taxes.

Section 2.—After payment is made, the collector of internal revenue or the official in charge of the collection of taxes, shall cover the sum collected into the Treasury of Porto Rico, reporting to the Treasurer the total amount of the tax paid under protest, which said amount shall be deemed to be receipts from any taxes, and the amount thereof shall be used to meet the requirements of the Treasury of Porto Rico, and that part of the tax paid under protest belonging to the respective municipalities in accordance with law shall be paid by the Treasurer of Porto Rico to the said municipalities; and whenever a final decision is rendered in a suit for the refunding of the taxes paid under

protest, if adverse to The People of Porto Rico, that part of the tax to be refunded by the municipality or municipalities shall be deducted by the Treasurer of Porto Rico from any taxes which, for the following fiscal year, are to be paid to the municipality or municipalities; *Provided*, That such deduction shall be made one-half in the first semester and the other half in the second semester of the following fiscal year.

Section 3.—A taxpayer who shall have paid under protest the whole or part of any tax may, within the term of one year from the date of payment, sue the Treasurer of Porto Rico in an insular court of competent jurisdiction, or in the District Court of the United States for Porto Rico, to secure the return of the amount protested. The Attorney General shall represent the Treasurer of Porto Rico in such suits. Upon the filing of the complaint, if it be filed in an insular court, it shall follow the procedure, conditions and requirements provided by the Code of Civil Procedure in an ordinary action. When the case is ready for trial, the court shall fix the day for the trial thereof, on petition of any of the parties, with preference to any other matter pending before it. When final decision is rendered, if favorable to the taxpayer, the Treasurer of Porto Rico shall proceed to return to him the amount directed in the decision, to be charged against any fund in the Treasury not otherwise appropriated plus interest on such amount at the rate of six (6) per cent per annum, computed from the date of the filing of the complaint in the court or on the petition of the taxpayer, the Treasurer shall credit him with the total amount to be returned, to be applied to the payment of any tax already due and unpaid or to become due in the future; *Provided*, That said credit may be transferred by the taxpayer, and then the Treasurer of Porto Rico shall credit it to the assignees, for all purposes of the law. Costs, expenses and attorney's fees shall be imposed in the discretion of the court in the same manner as in all other civil cases.

Section 4.—Any party may take an appeal in accordance with the provisions of the law for appeals in civil cases.

Section 5.—Any taxpayer filing a claim against the Treasurer of Porto Rico in accordance with the provisions of this Act,

shall attach to the said claim the receipt for the tax paid under protest, or a certified copy thereof.

Section 6.—Act No. 9 of June 23, 1924, and Act No. 84 of August 20, 1925, are hereby repealed, as well as all laws or parts of laws in conflict herewith; *Provided*, That any act, proceeding or right born under the protection of the laws hereby repealed, shall continue so protected by the provisions thereof, until its termination.

Section 7.—It is hereby declared that an emergency exists for the immediate taking effect of this Act, and, therefore, it shall take effect immediately after its approval.

*Approved, April 19, 1927.*

## APPENDIX II.

### FORMER PORTO RICAN TAX REFUND ACTS.

(NO. 35.)

#### AN ACT

PROVIDING FOR THE PAYMENT OF TAXES UNDER PROTEST, ESTABLISHING A PROCEDURE FOR THE RECOVERY THEREOF, AND FOR OTHER PURPOSES (Laws of 1911, p. 124).

*Be it enacted by the Legislative Assembly of Porto Rico:*

Section 1.—That in all cases in which an officer charged by law with the collection of revenue due the Government of Porto Rico, shall institute any proceeding or take any steps for the collection of the same, alleged or claimed by such officer to be due from any person, the party against whom the proceeding or step is taken shall, if he conceives the same to be unjust or illegal, or against any statute, pay the same under protest.

Section 2.—Be it further enacted that, upon his making such payment, the officer or collector shall pay such revenue into the Treasury of Porto Rico, giving notice at the time of the payment to the Treasurer, that the same was paid under protest.

Section 3.—Be it further enacted that, the party paying said revenue under protest may, at any time within thirty days after making said payment, and not longer thereafter, sue the said Treasurer for said sum, for the recovery thereof in the court having competent jurisdiction thereto; and if it be determined that the same was wrongfully collected as not being due from said party to the Government, for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the Treasurer shall repay the same, which payment shall be made in preference to other claims on the Treasury. Either party to said suit shall have the right of appeal to the Supreme Court.

Section 4.—Be it further enacted that, there shall be no other remedy in any case of the collection of revenue or attempt to collect revenue illegally.

Section 5.—Be it further enacted that, no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in any wise issue, either supersedeas, prohibition, or any other writ or process whatever; but in all cases in which, for any reason, any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and none other.

Section 6.—Be it further enacted that, Section 12 of the Act of March 8, 1906, entitled "An Act to define injunctions and to prescribe when they may be issued, and to repeal an Act authorizing injunctions, approved March 1, 1902, and all laws in conflict herewith," is hereby amended so as to read as follows:

Section 12.—An injunction may be granted, upon the petition of The People of Porto Rico, to enjoin and suppress the keeping and maintaining of a common nuisance. The petition shall be verified by the fiscal of the district in which the common nuisance exists, or by the Attorney General, upon information and belief, and no bond shall be required.

Section 7.—Be it further enacted that, this Act shall take effect immediately upon its approval.

*Approved March 9, 1911.*

(NO. 76.)

AN ACT

TO AUTHORIZE SUITS AGAINST THE PEOPLE OF  
PORTO RICO (Laws of 1916, p. 151).

*Be it enacted by the Legislative Assembly of Porto Rico:*

Section 1. The district courts of Porto Rico shall hereafter be authorized to entertain suits against The People of Porto Rico, in the following cases:

(a) Actions for damages based upon contracts entered into after this Act takes effect.

(b) Actions to recover real or personal property or an interest therein, where the cause of action arises after the passage of this Act; *Provided*, That no recovery shall be had for any damages occasioned by The People of Porto Rico prior to the time of action brought.

Section 2. No action can be brought against The People of Porto Rico unless consent thereto is expressly included within the provisions of this Act, and every consent, express or implied, given by The People of Porto Rico and not expressly included herein, is hereby revoked.

Section 3. The procedure provided by law for civil cases at law in the district courts of Porto Rico shall govern the procedure in cases arising under this Act. Appeals may be taken to the Supreme Court of Porto Rico in the same cases, in the same manner, and within the same time as appeals are taken from the judgments in civil cases at law in the district courts.

Section 4. The same fees shall be paid in cases arising under this Act, and in the same manner and time, and subject to the same regulations, as is provided by law for civil cases in the districts courts of the Island; *Provided, however*, That every plaintiff, as condition precedent to commencing such suit, must furnish a bond satisfactory to the court in the sum of \$500 in answer for costs; *Provided, further, however*, That the court may exempt such litigants as show their inability to furnish the bond from giving same.

Section 5. Attorneys' fees, disbursements and costs shall never be included in any judgment against The People of Porto Rico.

Section 6. In any action against The People of Porto Rico under this Act, The People of Porto Rico may plead that all set-offs or counterclaims and all claims for damages whether liquidated or unliquidated which it may have against the plaintiff; and if upon the whole case the court finds that claimant is indebted to the Government, judgment shall be rendered accordingly.

Section 7. It shall be the duty of the judge to render a written opinion in support of every final judgment rendered, wherein findings of fact and conclusions of law shall be stated. A copy

of each opinion shall at once be transmitted to the Attorney General of Porto Rico and to the Governor of Porto Rico.

Section 8. It shall be the duty of the Attorney General to present to the Legislative Assembly at each session a report containing a list of all of the final judgments rendered against The People of Porto Rico during the preceding year, with his recommendations concerning the payment of and compliance with the same, and no payments shall be made until the Legislature shall have specifically appropriated money for the payment.

Section 9. All actions against The People of Porto Rico shall be prescribed, if suit is not begun within one year after the cause of action arises, except that actions referring to real property shall prescribe in two years. Any person having any claim against The People of Porto Rico for any cause of action arising prior to the taking effect of this Act shall within one year after said date present a petition to the Legislative Assembly of Porto Rico requesting authorization to bring suit for said claim in the manner herein provided for in this Act, stating the maximum amount of his claim, the date when the cause of action is alleged to have arisen and any other facts, which either house of the Legislative Assembly may request.

Section 10. There shall be no remedy in any case for the collection of claims against The People of Porto Rico other than that provided by this Act, and those which are now specifically authorized by the Civil Code or by acts of the Legislative Assembly; *Provided, however,* That all such actions shall be brought only in the Insular district courts.

Section 11. No execution or other process of the court shall be granted to enforce collection of judgment against The People of Porto Rico.

Section 12. Claims against The People of Porto Rico shall not be assignable in any manner, nor shall they be subject to garnishment or attachment proceedings in any court.

Section 13. Process, and all pleadings, notices, and papers in connection with any action or proceeding against The People of Porto Rico shall be served upon the Governor and the Attorney General in the manner provided by law.

Section 14. All laws or parts of laws in conflict herewith are hereby repealed.

Section 15. This Act shall take effect on July 1, 1916.  
*Approved April 13, 1916.*

(NO. 17.)

## AN ACT

TO REGULATE THE ADMINISTRATIVE AND JUDICIAL PROCEDURE WITH REGARD TO TAXES PAID UNDER PROTEST, AND TO REPEAL THE ACT OF MARCH 9, 1911, RELATIVE TO THE SAME MATTER.  
(Laws of 1920, p. 124).

*Be it enacted by the Legislature of Porto Rico:*

Section 1. That whenever any taxpayer believes that he should not pay a tax because it is illegal, excessive or wrongful, he shall pay the same upon request of the collector of taxes of his district and shall request the said collector, should he desire to make any claim, to endorse the tax receipt with the statement that he pays the same under protest because he considers the tax to be illegal, excessive or wrongful, which said endorsement shall be signed by the collector.

Section 2. That any taxpayer making payment as above shall file within a term of fifteen days from and after the date of the notice of payment under protest signed by the collector, a complaint in the proper district court pursuant to the Code of Civil Procedure, against the Treasurer of Porto Rico, making pertinent allegations on the petition for such relief as he may desire to obtain from the court, that the said tax is illegal, excessive or wrongful, and he shall attach to the said complaint the protested tax receipt, a certificate from the office of the Treasurer setting forth that he has paid all his taxes, and shall file in the office of the secretary of the court pursuant to law, a bond to answer for such expenses and costs as may be caused by his claim in case of the dismissal thereof.

Section 3. That the Treasurer of Porto Rico, through the Attorney General or the law clerk or officer designated by the latter from his department, or any district fiscal of the island, shall answer the said complaint within the term provided by law for any answer and shall make therein, in their order, his allega-

tions as to the striking out of particulars of the complaint and demurrers.

Section 4. That the district court shall designate on each calendar such days as it may deem necessary to pass upon all suits for protested taxes, and shall fix the day for trial thereof without the necessity of a request therefor, and such suits shall be decided as all others, first passing upon the allegation relative to striking out particulars and upon demurrers, and then holding the hearing of the case in accordance with the rulings on such incidental questions. If the decision be in favor of the taxpayer, and the judge believes it to be just, he shall grant to the taxpayer such costs and attorney's fees as he may deem reasonable. If the decision be adverse to the taxpayer, the costs shall be taxed against him together with a reasonable amount to be fixed in the decision by way of indemnity to The People of Porto Rico for such work as may have been done in the suit by the attorney for the said People of Porto Rico, as if he had been a private lawyer, and the said costs and indemnity shall be covered into the public treasury.

Section 5. That either party to said suit may appeal from the decision of the District Court to the Supreme Court, but the appeal shall be filed within a term of fifteen days, and the statement of the case must be filed and approved within another term of fifteen days.

Upon the filing of the record on appeal in the Supreme Court together with another bond in a reasonable amount to be fixed by the Judge of the District Court, to answer for such expenses and costs as may be occasioned by the appeal, such appeal shall be prosecuted by filing the brief of the appellant within the following fifteen days, and by holding the hearing in preference to any other matter in the said Supreme Court.

In the decision of the Supreme Court the same declaration will be made as regards costs and indemnity as provided in Section 4 of this Act. Said costs shall be taxed in the sum of twenty-five dollars.

Section 6. That at any time that The People of Porto Rico shall show, through a certificate issued by the Treasurer, that the taxpayer complainant has not paid any other tax subsequently

thereto, within the time fixed by law, he shall be deemed to have withdrawn his suit with costs and with the indemnity fixed in Section 4 of this Act taxed against him.

Section 7. That from and after a tax paid under protest is received, the same shall be considered as all other revenue from taxes, the amount thereof to be applied to the obligations of the Treasury of Porto Rico, and the part of the protested tax appertaining to the respective municipalities, pursuant to law, shall be turned over to them.

Section 8. That when a decision in a suit for taxes paid under protest shall become final, if adverse to The People of Porto Rico, the Treasurer shall, upon receipt of the proper certificate from the District Court, include in such estimate as he may present to the Governor, in accordance with the Organic Act, the necessary amount to reimburse the taxpayer for such sum as shall have been fixed by the court for the illegal tax and costs.

And the part of the said tax which should be reimbursed by the municipality or municipalities among which it was distributed, shall be deducted by the Treasurer out of taxes to be turned over to such municipality or municipalities in the following year, by halves, one-half in the first semester and the other half in the second semester of the following fiscal year.

Section 9. That all amounts paid to this date by way of taxes, excises or fees, under protest, shall be transferred from the special trust fund into which the same have been covered, to general funds of the Insular Treasury.

Section 10. That the law of March 9, 1911, relative to the payment of taxes under protest, is hereby repealed.

Section 11. That this Act shall take effect ninety days after its approval.

*Approved May 13, 1920.*

(NO. 9)

AN ACT

PROVIDING FOR THE PAYMENT OF TAXES UNDER PROTEST; ESTABLISHING A PROCEDURE TO AUTHORIZE THE COLLECTION AND RETURN THEREOF; TO CREATE A SPECIAL FUND; TO REPEAL ACT NO. 17 OF MAY 13, 1920, AND FOR OTHER PURPOSES (Laws of Spec. Sess. 1924, p. 70).

*Be it enacted by the Legislature of Porto Rico:*

Section 1. Whenever a taxpayer believes that he should not pay a tax or part thereof because he understands that it is illegal, excessive or wrongful, he shall, however, have the obligation to pay the same in full upon request of the collector of taxes of his district, or of the official in charge of the collection of taxes, and shall ask the said collector or the said official in charge of the collection of taxes, should he desire to make any claim, to endorse the tax receipt specifically stating whether the said protest refers to the whole or to a part of the tax paid under protest, and setting forth the exact amount protested. The said endorsement shall be signed by the taxpayer and by the collector or officer in charge of the collection of taxes.

Section 2. After payment is made, the collector of taxes or the official in charge of the collection of taxes, shall cover the sum collected into the Treasury of Porto Rico, reporting to the Treasurer the total amount of the tax, as well as the part thereof paid under protest.

Section 3. The moment that a tax paid under protest is received, the part thereof not protested, if there be any, shall be considered as all other receipts from taxes, the amount of which is to be applied to the obligations of the Insular Government, and in the case of property taxes the part of said tax pertaining to the respective municipalities pursuant to law, shall be paid over to them.

The protested part shall be covered into a special fund to be known as "Taxes paid under protest—Trust Fund."

Section 4. A taxpayer who shall have paid under protest the whole or part of any tax shall, within a term of not to exceed thirty

days from and after the date of payment, sue the Treasurer of Porto Rico in a court of competent jurisdiction, to secure the return of the amount protested. The Treasurer of Porto Rico, through the Attorney General or through the official designated by the latter from his department, shall answer the said suit within the term granted by law for the filing of answers and shall make therein, in their order, allegations to strike out particulars of the complaint and demurrers.

When the case is ready for trial the court before which the action is pending shall fix the day for the trial thereof without the necessity of a request from the parties, first serving due notice on them.

When the final decision is rendered, if favorable to the taxpayer, the Treasurer of Porto Rico shall proceed to return to him the amount directed in the decision, to be charged against the fund "Taxes paid under protest—Trust Fund," referred to in section 3 hereof.

If the decision be favorable to The People of Porto Rico, the Treasurer shall cover from the fund known as "Taxes Paid Under Protest—Trust Fund," into the proper fund such amount of the tax as directed by the court in his decision, turning over to the respective municipalities the proportion established by law in cases of property taxes.

Section 5. Either party may appeal to a higher court by filing in the court *a quo* his appeal within ten days after the decision is rendered, as provided by section 4 of this Act; *Provided*, That if the taxpayer be the appellant he shall file, together with the petition for appeal and in the court appealed from, a bond in such sum as the court shall fix to answer for such costs, expenses and damages as The People of Porto Rico might suffer by reason of said action.

The said appeal shall be prosecuted pursuant to the provisions of law for appeals in civil cases, and the court of appeals shall hold the hearing with preference over any other matter pending before it.

Section 6. Any taxpayer filing a suit against the Treasurer of Porto Rico in accordance with the provisions of this Act shall attach to the said suit the receipt for the tax paid under protest, or a certified copy of said receipt.

Section 7. That the sum of fifteen thousand (15,000) dollars or such part thereof as may be necessary is hereby appropriated out of any funds in the Insular Treasury, not otherwise appropriated, for the payment by the Treasurer of Porto Rico of such costs as by judgment of any competent court may be allowed to any taxpayer who shall have brought suit pursuant to this Act.

Section 8. Act No. 17 of May 13, 1920, as well as all laws or parts of laws in conflict herewith are hereby repealed; *Provided*, That any action, proceeding or right arising from and exercised under the act hereby repealed, shall continue under the protection and provisions thereof until its termination.

Section 9. It is hereby declared than an emergency exists for the immediate taking effect of this Act, and therefore the same shall take effect immediately after its approval.

*Approved, June 23, 1924.*

(NO. 84.)

#### AN ACT

TO AMEND SECTIONS 3 AND 4 OF ACT NO. 9, ENTITLED "AN ACT PROVIDING FOR THE PAYMENT OF TAXES UNDER PROTEST; ESTABLISHING A PROCEDURE TO AUTHORIZE THE COLLECTION AND RETURN THEREOF; TO CREATE A SPECIAL FUND; TO REPEAL ACT NO. 17 OF MAY 13, 1920, AND FOR OTHER PURPOSES," APPROVED JUNE 23, 1924, AND FOR OTHER PURPOSES (Laws of 1925, p. 580).

*Be it enacted by the Legislature of Porto Rico:*

Section 1. That Sections 3 and 4 of Act No. 9, entitled, "An Act providing for the payment of taxes under protest; establishing a procedure to authorize the collection and return thereof; to create a special fund; to repeal Act No. 17 of May 13, 1920, and for other purposes," approved June 23, 1924, are hereby amended to read as follows:

"Section 3. The moment that a tax paid under protest is received, the part thereof not protested, if there be any, shall be considered as all other receipts from taxes, the amount of which is to be applied to the obligations of the Insular Government, and in

the case of property taxes, the part of said tax pertaining to the respective municipalities pursuant to law, shall be paid over to them. The protested part shall be covered into a special fund to be known as 'Taxes Paid Under Protest—Trust Fund,' to be held until the final decision of a court of justice is rendered upon the legality of the collection of the taxes so protested, and likewise interest at the rate of six (6) per cent on the protested part shall be covered monthly into the said trust fund, taking the sum necessary therefor out of such moneys as may be available in the Treasury of Porto Rico, for which purpose the Treasurer of Porto Rico is hereby authorized and empowered to dispose of such moneys in the Treasury of Porto Rico.

"Section 4. A taxpayer who shall have paid under protest the whole or part of any tax shall, within a term of not to exceed thirty days from and after the date of payment, sue the Treasurer of Porto Rico in a court of competent jurisdiction, to secure the return of the amount protested, and summons shall be served on the Treasurer of Porto Rico and the Attorney General within thirty days after the time of filing such suit. If the said summons be not effected within the aforesaid term of thirty days, the plaintiff's suit shall be held to be dismissed and the court shall render judgment of dismissal with prejudice as between the parties. The Attorney General, or a person designated by him, shall represent the Treasurer of Porto Rico in such suits. When any case is ready for trial the court shall set a day for the trial thereof without waiting for the parties to ask for it.

"When final decision is rendered, if favorable to the taxpayer, the Treasurer of Porto Rico shall proceed to return to him the amount directed in the decision, to be charged against the fund 'Taxes Paid Under Protest—Trust Fund,' referred to in Section 3 hereof, plus interest on such amount, at the rate of six (6) per cent a year, to be computed from the date on which payment under protest was made to the date on which actual return is made by the Treasurer to the taxpayer of the amount directed by the court to be returned.

"If the decision be favorable to The People of Porto Rico, the Treasurer shall cover from the fund known as 'Taxes Paid Under Protest—Trust Fund,' into the proper fund, the tax directed by

the court in its decision, turning over to the respective municipality the proportion established by law in cases of property taxes."

Section 2. All laws or parts of laws in conflict herewith are hereby repealed.

Section 3. It is declared that an emergency exists for the immediate taking effect of this Act, and therefore, it shall take effect immediately after its approval.

*Approved, August 20, 1925.*

INCOME TAX LAW — ACT NO. 80 OF 1919 (Laws of 1919, pp. 664, 665).

Section 58.—Where a taxpayer is not agreed to the decision of the Treasurer he may, within the fifteen days following notice of such decision, whether such notice is served by agent or by mail, apply in writing for the reconsideration of the case, producing all such evidence as he may deem pertinent and such as may be required by the Treasurer.

Section 61.—That where the Treasurer dismisses a petition for reconsideration, or where he modifies his first decision though not in terms prayed for by the taxpayer, such taxpayer may, within fifteen days following the notification of such decision, appeal to the Board of Review and Equalization created by law, alleging in writing and under oath the facts upon which he bases his claim and the reasons of law in support thereof.

Section 63.—That the decisions of the Board of Review and Equalization shall be final. In such cases the taxpayer shall pay the tax imposed upon him, within the time fixed in Section 55, under protest, and he may interpose within ten days following such payment under protest, a sworn complaint against the Treasurer of Porto Rico and before a court of competent jurisdiction. Said cases shall be given preference and priority on the calendars of the courts, and all defenses against the complainant to be offered by the defendant shall be made at one time and in one bill, and the judge shall decide at one sole hearing in strict order of procedure. The trial shall be promptly set for final decision and any unwarranted delay on the part of the plaintiff shall be sufficient grounds for a judgment of dismissal.

Section 66.—That the Treasurer be, and he is hereby, authorized to remit, reimburse or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.

That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or without legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act.

### APPENDIX III

## OPINIONS OF PORTO RICO SUPREME COURT CONCERNING RECOVERY OF PROTESTED TAXES

### Supreme Court of Porto Rico

OFFICE OF THE SECRETARY-REPORTER, SAN JUAN

IN THE SUPREME COURT OF PORTO RICO

PEDRO B. JESUS, *Plaintiff and*  
*Appellant,*

*v.*

JUAN G. GALLARDO, *Treasurer of*  
*Porto Rico, Defendant and Ap-*  
*pellee.*

No. 3614

} Appeal from the District  
Court of Humacao

OPINION OF THE COURT DELIVERED BY  
MR. JUSTICE FRANCO SOTO

San Juan, Porto Rico, July 8, 1925

Pedro B. Jesus filed a complaint in the District Court of Humacao for the refund of the sum of \$195.53 paid under protest to the Treasurer of Porto Rico as taxes.

The defendant-appellee raised the question of jurisdiction in the court *a quo*, alleging that the said court had no original jurisdiction because of the amount involved. This plea was overruled, albeit the action was dismissed on other grounds.

However, the question of jurisdiction raised and insisted on by appellee in his brief is primordial and of vital importance in this case.

On March 9, 1911, the Legislature for the first time enacted a law establishing procedure for the recovery of taxes paid under protest, section 3 thereof providing that the action should be brought "in the court having competent jurisdiction."

This Act, in relation to Act No. 76 of April 13, 1916, authorizing suits against The People of Porto Rico, was interpreted in

the cases of *Sauri & Subira v. Sepulveda*, District Judge, 25 P. R. R. 224, and *Serralles v. Treasurer of Porto Rico*, 30 P. R. R. 220. In neither of these cases cited by the lower court was it held that the Act of 1911 had been repealed by the Act of 1916. It was held rather that the two acts coexisted independently and each had its own force.

On March 13, 1920, the Legislature enacted Act No. 17 to regulate administrative and judicial procedure with regard to taxes paid under protest and to repeal the Act of March 9, 1911. Section 2 thereof provided that the taxpayer should file his complaint within the time specified "in the proper district court," thus changing the provision contained in the Act of 1911. The provision was clear. It changed by its wording the meaning of the former Act exclusively designating the district courts as having jurisdiction to entertain suits for the refund of taxes paid under protest, without regard to the amount involved. But finally Act No. 9 of 1924, by which this case is governed, re-enacted the provision of the original Act. Its section 4 is as follows:

"Section 4.—A taxpayer who shall have paid under protest the whole or part of any tax shall, within a term of not to exceed thirty days from and after the date of payment, sue the Treasurer of Porto Rico in a court of competent jurisdiction, to secure the return of the amount protested. The Treasurer of Porto Rico, through the Attorney General or through the official designated by the latter from his department, shall answer the said suit within the term granted by law for the filing of answers and shall make therein, in their order, allegations to strike out particulars of the complaint and demurrers. • • •"

It may be presumed that when the Legislature varied the terms of the Act of 1920 on that point it showed a clear intention of not conferring upon the district courts exclusive jurisdiction of such actions, but that the jurisdiction was to be determined by the amount involved, following therefor the general Act of March 10, 1904, Comp. 1911, p. 262. And undoubtedly it was considered that it would not be equitable or just to compel a taxpayer to resort to a district court to recover small sums, authorizing him to

sue in the proper municipal court, provided the amount involved did not exceed \$500, including interest. Section 1173, Comp. 1911, p. 265.

For the reasons stated the judgment appealed from should be modified so that its dispositive part may read as follows: "The demurrer to the jurisdiction is sustained and the complaint is dismissed without special imposition of costs," and, as so modified, the judgment is affirmed.

(Signed) CARLOS FRANCO SOTO,  
*Associate Justice.*

I, JOAQUIN LOPEZ, Secretary-Reporter of the Supreme Court of Porto Rico, CERTIFY: That the foregoing is a true and correct copy of its original as the same appears on file and of record in my office; and at the request of the Attorney General of Porto Rico, for official use, I issue this certificate under my hand and Seal of the Supreme Court, in San Juan, Porto Rico, this 17th day of November, 1926.

(Signed) JOAQUIN LOPEZ,  
*Secretary-Reporter of the Supreme Court of Porto Rico.*

UNION CENTRAL LIFE INSURANCE COMPANY,  
PLAINTIFF AND APPELLANT, v. GROMER,  
TREASURER OF PORTO RICO, DEFENDANT  
AND RESPONDENT.

Appeal from the District Court of San Juan, Section 2,  
in an action for the refund of taxes paid under protest.

Motion of respondent for reconsideration.

No. 824.—Originally decided June 27, 1913.

Motion for reconsideration decided January 31, 1914.

On June 27, 1913, this court rendered judgment in the above-entitled case reversing the judgment of the District Court of San Juan, Section 2, of October 31, 1911, and decreeing that the plaintiff company recover from the Treasurer of Porto Rico the sum of \$3,621.73, with legal interest from June 23, 1911, when the complaint was filed, without special imposition of costs.

The Treasurer of Porto Rico filed a motion on October 10 last for a reconsideration of the judgment, praying that it be modified by striking out the words 'with legal interest from June 23, 1911, when the complaint was filed,' and allowing its other pronouncements to remain in force.

In accordance with the doctrine laid down by the Supreme Court of the United States, we must recognize that the action is really against The People of Porto Rico although in form the Treasurer of Porto Rico is the defendant. *Smith v. Reeves*, 178 U. S. 436; *Fitts v. McGhee*, 172 U. S. 516; *Reagan v. Farmers' Trust Co.*, 154 U. S. 362; *Virginia Coupon Cases*, 114 U. S. 270; *Hagood v. Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443; *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446.

The people of Porto Rico being the real defendant, we must consider whether it should be adjudged to pay to the plaintiff interest on the sum which, according to the aforesaid judgment, it is obliged to refund.

• • • • •

By Act No. 35 of March 9, 1911, The People of Porto Rico consents to be sued only for the amount illegally collected as taxes, but does not consent to be sued for the interest thereon, because if such had been its intention it would have so stated expressly in the said act, which as a special act regulates the present case, and we are not permitted to invoke the provisions of the Civil Code in order to establish an obligation which The People of Porto Rico did not see fit to impose upon itself.

• • • • •

For the foregoing reasons that part of our judgment of June 27, 1913, decreeing that the plaintiff recover from the Treasurer of Porto Rico legal interest on the sum of \$3,621.73, which the latter was ordered to refund, is set aside and the rest of the judgment will remain in force.

*Judgment of June 27, 1913, modified by striking out the pronouncement regarding interest.*

Justices Wolf and Aldrey concurred.

Mr. Justice del Toro took no part in the decision of this motion."

Union Cent. Lf. Ins. Co. v. Cromer, 20 Porto Rico Rep. 80.

SAURI & SUBIRA, PETITIONERS, v. SEPULVEDA, DISTRICT JUDGE, RESPONDENT (PEOPLE, INTERVENOR).

*Petition for Certiorari to the judge of the District Court of Ponce in an action for the recovery of taxes paid under protest.*

No. 173—Decided May 12, 1917.

Mr. Justice Hutchinson delivered the opinion of the court.

This is a suit brought by a taxpayer against the Treasurer of Porto Rico in accordance with the provisions of an act entitled "An Act providing for the payment of taxes under protest, establishing a procedure for the recovery thereof, and for other purposes," approved March 9, 1911.

Defendant moved to quash the summons for reasons stated as follows:

"That although it is said in the complaint that this suit is brought by Sauri and Subira, plaintiffs, against Charles F. Hill, Assistant Treasurer, now Acting Treasurer of Porto Rico, the action, in point of fact, is established against the People of Porto Rico (Union Central Life Ins. Co. v. Cromer, 20 P. R. R. 80).

"That, as appears from the return • • • the same" (summons) "was served upon • • • Acting Treasurer of Porto Rico.

"That in accordance with Section 13 of Act No. 76, approved April 13, 1916, to authorize suits against The People of Porto Rico, 'process and all pleadings, notices, and papers in connection with any action or proceeding against the People of Porto Rico shall be served upon the Governor and the Attorney General in the manner provided by law'; and as shown by the summons in this case none of these requirements were complied with."

The ruling of the district court sustaining this motion is before us by certiorari (pp. 224-225).

• • • "Section 13 is copied *verbatim* in the motion to quash, *supra*. Manifestly, on its face it includes an action of

this kind \* \* \*; for if the suit against the Treasurer \* \* \* is an "action or proceeding against The People of Porto Rico," as beyond all cavil it is, and as this court has held it to be (*Union Central Life Insurance Company v. Governor*, 20 P. R. R. 80), then to continue in force such implied repeal of subdivision 5 of Section 93 of the Code" (that if the suit is against the government of Porto Rico the summons must be served upon the Governor) "would to that extent contradict the plain and unmistakable terms of the latest unqualified expression of the legislative will in this regard (p. 231).

\* \* \* The contention that the present proceeding, although in fact and in substance an action against the People of Porto Rico, is in form against the Treasurer of Porto Rico, simply draws a superficial distinction, without establishing any fundamental difference. It is not, nor can it be, urged that prior to 1911 a suit of this kind, or any suit the result of which, if successful, would be to transfer money from the Insular Treasury into the pockets of plaintiff, could have been maintained against the Treasurer of Porto Rico upon the theory that such a suit, being in form against the Treasurer, is not an action against the People of Porto Rico. The law of 1911 is a formal consent by The People of Porto Rico to be sued for the recovery of taxes paid under protest. Except for the specific recognition and ratification of such consent contained in section 10 of the law of 1916, unquestionably the whole of the law of 1911 would have been repealed by the sweeping terms of Section 2 of the later enactment. Indeed, it would seem much more accurate, although somewhat paradoxical, to say that the only logical effect of the two sections construed together in the order in which they occur in the text is to operate a simultaneous repeal and re-enactment or continuation of the law of 1911, subject, however, to the restrictions, limitations, and modifications indicated in the context.

Certainly it cannot be contended that the legislature in 1916 did not have in mind the law of 1911, and to say that suits previously authorized in form against the Treasurer or any other officer of the Government, in his representative capacity, were not intended to be included in the provisions of Section 13, would be simply to annex thereto, by judicial legislation, a proviso that the legislature in its wisdom did not see fit to add. \* \* \*

But it can hardly be said that the question of repeal by implication is necessarily involved in this case, and perhaps more stress has been laid thereon than can be justified by the actual situation. The form of the action authorized in 1911 is not affected at all by the law of 1916, which neither in letter nor in spirit negatives either the idea of a suit in form against the Treasurer or the incidental service of summons upon him, \* \* \*. Its provisions as to process are affirmative, not negative; cumulative and complementary, not derogatory. Both statutes can stand together in perfect harmony in so far as this feature is concerned and should be construed, each in connection with the other, to require a triplicate service of the summons upon the Governor, the Attorney General and the Treasurer, instead of upon the Treasurer alone or upon the Governor and the Treasurer, as the case may have been prior to the later enactment.

The order of the district court quashing the summons served on the Treasurer and requiring an amended complaint should be annulled and the ruling upon which such order was based in so far as it holds service upon the Governor and Treasurer to be necessary should be affirmed.

*Petition granted.*

Chief Justice Hernandez and Justices Wolf, del Toro, and Aldrey concurred (pp. 232-234).

Sauri and Subira v. Sepulveda, 25 P. R. R. 224.

AMERICAN RAILROAD COMPANY, PLAINTIFF  
AND APPELLANT, v. TREASURER OF PORTO  
RICO, DEFENDANT AND APPELLEE.

Appeal from the District Court of San Juan in an Action for Refund of Taxes Paid under Protest.

No. — Decided ———, 1922.

Mr. Justice Wolf delivered the opinion of the court.

This appeal involves principally the construction of Section 6 of Act No. 17, approved May 13, 1920, as follows:

"Section 6.—That at any time that The People of Porto Rico shall show, through a certificate issued by the Treasurer, that the taxpayer complainant has not paid any other tax subsequently thereto, within the time fixed by law, he shall be deemed to have withdrawn his suit with costs and with the indemnity fixed in Section 4 of this Act taxed against him."

The second amended complaint bears date March 15, 1921, and recited that certain taxes assessed against the complainant were paid under protest. On the 5th of April, 1921, the Treasurer moved to dismiss the complaint by virtue of Section 6, *supra*, showing, among other things, that the taxes for the first and second semesters of the fiscal year 1920-1921 had not been paid. The District Court of San Juan, Second Section, rendered judgment dismissing the complaint and the appeal is from the said judgment.

The appellant maintains that as said Section 6 only went into effect in August, 1920, its terms would only be applicable to the second semester of 1920-1921, and that this tax did not fall due until January, 1921. We agree with the appellee that even the first semester was payable up to September, 1920; but the appellant was in any event bound for the taxes due for the second semester payable on the first of January, 1921.

But the appellant also for the first time on appeal says:

"But the main reason why the judgment of the district court should be annulled is to be found in the deficiency of the Act of 1920, which provides no guaranty for the taxpayer, inasmuch as the refunding of his money is left to the discretion of the legislature."

There was no assignment of error, but aside from that, this question raised for the first time on appeal comes too late. *Kent v. People of Porto Rico*, 207 U. S. 113; *Torres v. Lothrop*, 231 U. S. 171; *Porto Rico Benevolent Society v. Municipality of Ponce*, 28 P. R. R. 403, and cited cases; *Torres v. Lothrop*, 16 P. R. R. 175. As the appellee points out, this alleged error is set forth in its brief without argument or relation of authorities.

The judgment appealed from must be *Affirmed*.

Chief Justice del Toro and Justices Aldrey and Hutchison concurred.

Am. R. R. Co. v. Treasurer of Porto Rico, 30 Porto Rico Rep. 202.

SERRALLES, PLAINTIFF AND APPELLANT, v.  
TREASURER OF PORTO RICO, DEFENDANT  
AND APPELLEE.

Appeal from the District Court of San Juan in an Action for Refund of Taxes.

No. 2603—Decided March 17, 1922.

Mr. Chief Justice del Toro delivered the opinion of the court.

This is an appeal from the judgment rendered in an action brought by Juan Eugenio Serralles against Jose E. Benedicto, Treasurer of Porto Rico, for the refund of taxes unlawfully collected.

In his declaration for the year 1918 the plaintiff declared an income of \$119,768.32. Of this \$108,022.78 was his share of the profits of the partnership of Succession of J. Serralles. The laws in force in 1917 and 1918 were different as regards the rate fixed in the ascending scale of income. The tax in 1918 was higher. The Treasurer computed the tax as if all of the income declared had been received in 1918. The plaintiff paid without protest and thereafter, on August 2, 1920, wrote a letter to the Treasurer stating that of the income declared \$76,015.18 had been received in 1917 and that therefore the tax on this sum should be calculated in accordance with the law in force that year and not according to the law in force in 1918, as had been done. He concluded by asking for a refund of the \$7,708.30 which for that reason had been collected in excess. The Treasurer replied on August 10, 1920, refusing the request because the income had been received by Serralles as the result of a balance struck on April 30, 1918, and that was the day on which he validly acquired it, the fact that the balance covered a period of one year ending on that date being unimportant. Serralles then brought this action by a complaint dated August 17, 1920.

The Treasurer pleaded that the complaint did not state facts sufficient to constitute a cause of action and the demurrer was overruled. He then filed a motion for dismissal of the complaint because of failure to give the security required by Section 4 of Act No. 76 of 1916, and also filed an answer. The case was tried and submitted for judgment on April 27, 1921.

At this juncture, on August 26, 1921, the district court entered judgment dismissing the complaint based exclusively on the motion relative to the giving of security which had remained pending. *The district court considered this to be an action against The People of Porto Rico* and that before commencing it the plaintiff should have furnished the bond required by Section 4 of Act No. 76 of 1916.

*The plaintiff appealed from the judgment of August 26, 1921, and alleged that the court erred in applying to this case said Act No. 76 of 1916 when the law really applicable to it is Act No. 80 of 1919.*

*We believe that the appellant is right.* Act No. 76 of 1916 authorizes actions against The People of Porto Rico according to its own terms and although in proper cases an action for the refund of taxes may be considered an action against The People of Porto Rico, to which Section 4 of Act No. 76 of 1916 may be applicable, when such an action is brought exclusively under a special law which is complete in itself, it is sufficient to comply with the terms of that law. And that is actually the case before us.

This is an action for the refund of an income tax. Act No. 80 of 1919 was enacted to provide revenues for The People of Porto Rico through the levying of certain income taxes. Section 57 thereof provides that the Treasurer shall compute the amount of the tax and give notice of the result to the taxpayer. Section 58 confers upon the taxpayer the right to request the Treasurer to reconsider his decision. Section 59 determines what the Treasurer shall do in such a case. Section 61 gives the taxpayer the right of appeal to the Board of Review and Equalization in case the Treasurer's decision is still adverse to him. Section 62 prescribes the procedure to be followed before the board and the powers of the board. And Section 63 provides that if the board's decision is adverse to the taxpayer he shall pay the tax under protest and may bring an action against the Treasurer of Porto Rico before the proper district court for a final determination of the matter. But that is not all. After establishing this complete system, Section 66 of the Act provides as follows:

"Section 66.—That the Treasurer be, and he is hereby, authorized to remit, reimburse, or make restitution for any tax or duty erroneously or unlawfully imposed or collected, as well as of the amount of any fine collected by error or without legal authority therefor.

"That when proper claim has been made to the Treasurer of Porto Rico for the return, reimbursement or remittal of any duties or taxes erroneously or illegally levied or collected, as well as for the amount of any fines collected by error or

without legal authority, if he refuses without reason to grant such a claim, the aggrieved party may appeal to the courts of justice, following therefor the procedure authorized and the proceedings established by Section 63 of this Act."

The plaintiff relied on that statute in resorting to the court in this case. That fact is admitted by the defendant-appellee in his brief. Act No. 80 of 1919 requires no previous security to be given and the wording of Section 4 of Act No. 76 of 1916 does not warrant the inference that it was the intention of the Legislature to make it applicable to all actions theretofore authorized against The People of Porto Rico and even to such actions as might be authorized in the future, generally or specially.

This being so, the sole ground on which the judgment of the district court was based has no foundation.

The appellee insists that the complaint does not adduce facts sufficient to constitute a cause of action. He alleges that in addition to Section 66 of Act No. 80 of 1919, Sections 61, 62, and 63 thereof are also applicable, and that inasmuch as it is not alleged in the complaint that an appeal was taken to the Board of Review and Equalization, or that the tax was paid under protest, the plaintiff has no right of action.

We do not entertain this view. It is true that Section 66 prescribes that the action shall follow the procedure authorized and the proceedings established by Section 63, but this clearly refers to the time within which to bring the action, to the title of the complaint and to the manner of prosecuting the action in court, all of which is to be found in Section 63, and it is not necessary to supplement the intent of the legislators by the provisions of Sections 61 and 62. Clearly the cases are different. The law is liberal and affords ample opportunities for correcting any error or repairing any injustice; first, when the taxpayer takes the first step and, second, when after the tax is levied and collected without difficulty or protest the taxpayer requests the refund of what in his opinion was unlawfully collected from him.

Having reached the foregoing conclusions, what should be our decision? It is necessary still to consider the case on its merits. The district court did not do this. The parties do not discuss the

question in their briefs. We might perhaps set a day for a new hearing in order to give the attorneys an opportunity to argue the case, but it seems to us that under all the circumstances it is more appropriate and fair to reverse the judgment appealed from and remand the case for further proceedings. In this manner we shall give due opportunity to the lower court, which under the law should first have it.

*Reversed and remanded.*

Justices Wolf, Aldrey, and Hutchison concurred.

Serralles v. Treasurer of Porto Rico, 30 Porto Rico, Rep.  
220.

#### APPENDIX IV.

#### EXTRACT FROM RESPONDENT'S BRIEF IN THESE CASES, ON REHEARING IN THE CIRCUIT COURT OF APPEALS—"ADEQUATE REMEDY AT LAW."

##### I AND II

Appellants' first and second points may conveniently be considered together. They allege that the decision of this court of March 15, 1921, in the *Camunas* case (*Camunas v. Porto Rico Ry. Lt. & Power Co.*, 272 Fed. 924) is applicable and controlling upon the question whether the taxpayers' right to sue for the return of taxes paid under protest under the later Porto Rican Acts of June 23, 1924 (Act No. 9), and August 20, 1925 (Act No. 84), provides "a plain, adequate, and complete remedy at law for the recovery of taxes paid under protest and which was open to the appellants in all of these cases" as held by this court in its opinion of September 25, 1926, in these cases (Opinion, p. 6); and that the present decision of this court is also contrary to that of the Supreme Court in *Risty v. Chicago, Rock Island and Pacific Ry. Co.*, *supra*, 270 U. S. 378, 388, 389, because (as appellants now claim) those Acts of 1924 and 1925 "expressly confine a taxpayer to the Insular Courts, and exclude him from the Federal court in suing for the recovery of a tax paid under protest."

The determination of these questions involves an examination of the course of legislation and of the decisions of the Insular Courts concerning suits for the return of taxes paid under protest.

(For the convenience of the court we are printing in the Appendix hereto copies of the pertinent Porto Rican statutes, viz., Act No. 35, March 9, 1911; Act No. 76, April 13, 1916; Act No. 17, March 13, 1920; Act No. 9, June 23, 1924; Act No. 84, August 20, 1925; with the sections of the Income Tax Act (Act No. 80) of 1919 relating to suits for refund of income taxes paid under protest; and quotations of the pertinent portions of the opinions of the Supreme Court of Porto Rico in the following cases, viz.: *Union Central Life Ins. Co. v. Gromer*, 20 P. R. R. 80 (January 31, 1914); *Sauri & Sulira v. Sepulveda*, 25 P. R. R. 224 (May 12, 1917); *Am. R. R. Co. v. Treasurer of Porto Rico*, 30 P. R. R.

202 (March 16, 1922); Serralles v. Treasurer of Porto Rico, 30 P. R. R. 220 (March 17, 1922); and Pedro B. Jesus v. Gallardo Treasurer (No. 3614, Supreme Court of Porto Rico, July 8, 1925, not yet reported; certified copy presented to this court with this brief.)

"On March 9, 1911, the Legislature for the first time enacted a law establishing procedure for the recovery of taxes paid under protest, Section 3 thereof providing that the action should be brought 'in the court having competent jurisdiction.'

"This act, in relation to Act No. 76 of April 13, 1916, authorizing suits against the People of Porto Rico, was interpreted in the cases of Sauri & Subira v. Sepulveda, District Judge, 25 P. R. R. 24, and Serralles v. Treasurer of Porto Rico, 30 P. R. R. 220. In neither of these cases cited by the lower court was it held that the Act of 1911 had been repealed by the Act of 1916. It was held rather that the two acts co-existed independently and each had its own force.

"On March 13, 1920, the Legislature enacted Act No. 17 to regulate administrative and judicial procedure with regard to taxes paid under protest and to repeal the Act of March 9, 1911. Section 2 thereof provided that the taxpayer should file his complaint within the time specified 'in the proper district court,' thus changing the provision contained in the Act of 1911. *The provision was clear.* It changed by its wording the meaning of the former act *exclusively designating the district courts as having jurisdiction to entertain suits for the refund of taxes paid under protest*, without regard to the amount involved."

Jesus v. Gallardo, *supra*, No. 3614, Supreme Court of Porto Rico, July 8, 1925.

The Act of March 9, 1911 provided (Section 2) that the officer or collector to whom taxes were paid under protest "*shall pay such revenue into the treasury of Porto Rico*, giving notice at the time of the payment to the Treasurer, that the same was paid under protest." There was *no provision* for its being paid into a trust fund or held in any separate funds. It was paid directly into the Treasury becoming there mingled with other funds of the Government of Porto Rico. The statute further provided (Section 3) for a suit by the protesting taxpayer at any time within thirty days after making such payment for the re-

covery thereof "in the court having competent jurisdiction there-to," and that

"if it be determined that the same was wrongfully collected as not being due from said party to the Government, for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the Treasurer shall repay the same, *which payment shall be made in preference to other claims on the Treasury*";

and further that (Section 3):

"Either party to said suit shall have the right of *appeal to the Supreme Court.*"

And that statute further provided, expressly, that (Section 4)

"There shall be *no other remedy* in any case of the collection of revenue, or attempt to collect revenue illegally";

and that (Section 5)

"no writ for the prevention of the collection of any revenue claim or to hinder or delay the collection of the same shall in any wise issue, either supersedeas, prohibition or any other writ or process whatever; but in all cases in which, for any reason, any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, *and none other.*" (Italics ours.)

As above observed, that statute provided for payment of protested taxes directly into the Treasury of Porto Rico. It made no provision for a trust fund for them, and no provision for holding them in any separate funds awaiting the result of judicial determination as to the correctness of the claim of the protesting taxpayer. A suit under that statute for the recovery of such protested taxes was therefore a

"suit the result of which, if successful, would be to transfer money from the Insular Treasury into the pockets of plaintiff," *confer* Sauri & Subira v. Sepulveda, *supra*, 25 P. R. R. 224, 232;

and it was therefore necessarily held by the Supreme Court of Porto Rico that

"In accordance with the doctrine held by the Supreme Court of the United States, we must recognize that the action is really against the People of Porto Rico although in form the Treasurer of Porto Rico is the defendant."

Union Central Life Ins. Co. v. Gromer, *supra*, 20 P. R. R. 80, 81, January 31, 1914 (citing Smith v. Reeves, 178 U.S. 436, and other decisions of the United States Supreme Court.)

Accordingly the Supreme Court of Porto Rico afterwards held that such suits for the recovery of protested taxes under said Act of March 9, 1911, were within the general scope of Act No. 76 of April 13, 1916, entitled "An Act to authorize suits against the People of Porto Rico," which (Section 1) gave to the "district courts of Porto Rico" alone, the authority to entertain suits against the People of Porto Rico, and provided (Section 2):

"No action can be brought against the People of Porto Rico unless consent thereto is expressly included within the provisions of this act, and every consent, express or implied, given by the People of Porto Rico and not expressly included herein, is here revoked,"

and that (Section 10)

"There shall be no remedy in any case for the collection of claims against the People of Porto Rico other than that provided by this Act, and those which are now specifically authorized by the Civil Code or by acts of the Legislative Assembly; *Provided, however, that all such actions shall be brought only in the Insular District Courts*";

and that the process and pleadings in any such suit should be served upon the Governor and the Attorney General "in the manner provided by law," and every plaintiff as a condition precedent to commencing such suit (Section 4) must furnish a bond in the sum of \$500.00 to answer for costs (except that the court might exempt poor litigants), and that (Section 8) it should be the duty of the Attorney General to present to the Legislative Assembly at each session a report containing a list of all of the final judgments rendered against the People of Porto Rico during the preceding year, with his recommendations concerning the payment of and compliance with the same,

"and no payments shall be made until the Legislature shall have specifically appropriated money for the payment."

This Act of 1916 came before the Supreme Court of Porto Rico in connection with the Act of 1911 in the case of Sauri and Subira v. Sepulveda, *supra*, 25 Porto Rico Rep. 224, decided May 12, 1917, wherein the plaintiff taxpayer having brought suit for the return of protested taxes under the Act of March 9, 1911, against "Charles F. Gill, Assistant Treasurer, now Acting Treasurer, of Porto Rico" in accordance with the provisions of Section 3 of the Act of March 9, 1911, providing for this suit against the Treasurer, the defendant moved to quash the summons for the reason, among others (p. 225) that in accordance with Section 13 of said Act of April 13, 1916, the action and process was against the People of Porto Rico and should have been served upon the Governor and Attorney General, instead of upon the Treasurer. The Supreme Court of Porto Rico, holding that the summons against the Treasurer under Section 3 of the Act of March 9, 1911, was proper, but that, by virtue of the Act of 1916, it was necessary to serve the summons in the suit also upon the Governor and the Attorney General, because it was a suit against the People of Porto Rico, said (pp. 232-233):

"The contention that the present proceeding, although in fact and in substance an action against the People of Porto Rico, is in form against the Treasurer of Porto Rico, simply draws a superficial distinction, without establishing any fundamental difference. It is not, nor can it be, urged that prior to 1911 a suit of this kind, or any suit the result of which, if successful, would be to transfer money from the Insular Treasury into the pockets of plaintiff, could have been maintained against the Treasurer of Porto Rico upon the theory that such a suit, being in form against the Treasurer, is not an action against the People of Porto Rico. The law of 1911 is a formal consent by the People of Porto Rico to be sued for the recovery of taxes paid under protest. Except for the specific recognition and ratification of such consent contained in section 10" (quoted above) "of the law of 1916, unquestionably the whole of the law of 1911 would have been repealed by the sweeping terms of Section 2 of the later enactment. Indeed, it would seem much more accurate, although somewhat paradoxical, to say that the only logical effect of the two sections construed together in the order

in which they occur in the text is to operate a simultaneous repeal and re-enactment or continuation of the law of 1911, subject, however, to the restrictions, limitations, and modifications indicated in the context.

"Certainly it cannot be contended that the legislature in 1916 did not have in mind the law of 1911, and to say that suits previously authorized in form against the Treasurer or any other officer of the Government, in his representative capacity, were not intended to be included in the provisions of Section 13, would be simply to annex thereto, by judicial legislation, a proviso that the legislature in its wisdom did not see fit to add."

Sauri and Subira v. Sepulveda, *supra*, 25 P. R. R. 224, 232-233.

In that state of the law, and in view of those decisions of the Supreme Court of Porto Rico, it is very clear that after the enactment of Act No. 76 of April 13, 1916, in view of the express proviso of Section 10 of that Act, as above quoted,

"that all such actions shall be brought only in the Insular district courts,"

and so long as there was no further expression of the legislative will of the Legislature of Porto Rico, no suit for the recovery of protested taxes could be maintained in the Federal court.

And in view of the law as it then stood under those statutes, this court necessarily held March 15, 1921, that in a suit begun August 27, 1919, while those statutes were in effect,

"The remedy for the recovery of taxes, paid under protest, under Section 3 of the Act of March 9, 1911, is not an adequate remedy for a party having otherwise a right to resort to the Federal court."

Camunas v. Porto Rico Ry. Lt. & P. Co., *supra*, 272 Fed. 924, 927 (Anderson, J.); the case now relied upon by appellants.

It is manifest that that decision was right and would now be controlling if the statutory law of Porto Rico were still the same that it was when that suit was begun on August 27, 1919 (or that it was at the date of that decision, March 15, 1921, since the Act of March 13, 1920 (Act No. 17), did not change the legislative policy of Porto Rico in this respect).

The next pertinent statute (omitting Act No. 80 of 1919, which related (Secs. 57-63 and 66) only to the recovery of protested *income tax* payments; see *infra*, Appendix, pp. 68-69), is Act No. 17 of May 13, 1920 (Appendix, *infra*, pp. 61-63), which took effect ninety days after its approval. That Act expressly repealed the law of March 9, 1911, and provided that any taxpayer paying taxes under protest might within fifteen days thereafter begin suit against the Treasurer of Porto Rico "*in the proper district court pursuant to the Code of Civil Procedure*" (Section 2), that "the district court" (Section 4) should designate on each calendar such days as it might deem necessary to pass upon suits for protested taxes, that the suit should be defended by the Attorney General or someone designated by him from his department, and that in case of decision adverse to the taxpayer the costs should be taxed against him (Section 4),

"together with a reasonable amount to be fixed in the decision *by way of indemnity to The People of Porto Rico* for such work as may have been done in the suit *by the attorney for the said People of Porto Rico*, as if he had been a private lawyer, and the said costs and indemnity shall be covered into the public treasury";

but either party might appeal "from the decision of the district court to the Supreme Court" (Section 5) within fifteen days and that in the decision of the Supreme Court (Section 5)

"the same declaration will be made as regards costs and indemnity as provided in Section 4 of this Act" (that is, if adverse to the taxpayer, a judgment for indemnity direct to the *People of Porto Rico*);

and that (Section 6) any time "The People of Porto Rico" should show through a certificate issued by the Treasurer that the taxpayer complainant had not paid any other tax subsequently due, within the time fixed by law, he should be deemed to have withdrawn his suit with costs and with the indemnity fixed in Section 4 of the Act to be taxed against him. Furthermore (Section 7)

"That from and after a tax paid under protest is received, *the same shall be considered as all other revenue from taxes*, the amount thereof to be applied to the obligations of the

Treasury of Porto Rico, and the part of the protested tax appertaining to the respective municipalities pursuant to law shall be turned over to them";

and (Section 9)

*"That all amounts paid to this date by way of taxes, excise or fees under protest shall be transferred from the special trust fund into which the same have been covered, to general funds of the Insular Treasury."*

And also (Section 8)

*"That when a decision in a suit for taxes paid under protest shall become final, if adverse to the People of Porto Rico, the Treasurer shall, upon receipt of the proper certificate from the District Court, include in such estimate as he may present to the Governor, in accordance with the Organic Act, the necessary amount to reimburse the tax payer such sum as shall have been fixed by the court for the illegal tax and costs."*

And the part of the said tax which should be reimbursed by the municipality or municipalities among which it was distributed, shall be deducted by the Treasurer out of taxes to be turned over to such municipality of municipalities in the following year, by halves, one-half in the first semester and one-half in the second semester of the following fiscal year."

It is too plain for argument that this Act of 1920 simply continued the legislative policy theretofore enunciated by the acts of 1911 and 1916, viz., that a suit for the recovery of protested taxes under that Act was a suit directly against the People of Porto Rico to recover from the Insular Treasury money that had already been paid into that Treasury and distributed between the Insular Government and the different municipalities, and that the suit could be brought only in the Insular courts—"in the proper district court" (Section 2, *supra*), with a right of appeal "to the Supreme Court" (Section 5, *supra*); and not in the Federal court. For this reason, as well as because of the requirement of Section 2 of that Act of 1920, that the complainant in a suit to recover protested taxes attach to his complaint not only the protested tax receipt but also a certificate from the office of the Treasurer, setting forth that he has paid *all his taxes*, and the provision of Section 6 thereof, above quoted, that at any time

"that the People of Porto Rico shall show, through a certificate issued by the Treasurer, that a taxpayer complainant has not paid *any other tax* subsequently thereto, within the time fixed by law, he shall be deemed to have withdrawn his suit with costs."

this court necessarily held, in *West India Oil Co. v. Gallardo*, 6 Fed. (2d), 523, 524, June 12, 1925, and in *Porto Rico Mercantile Co. v. Gallardo*, 6 Fed. (2), 526, 528, July 7, 1925, that the remedy provided under that Act of 1920 "is not a plain and adequate remedy at law."

*It necessarily follows, that, as above observed, if the statutory law of Porto Rico on this subject, and the legislative policy of that Island thereby established, had remained unchanged* from the date of the enactment of the Act of 1920 up to the date of the beginning of these suits, then it would have to be conceded that the appellants did not have a plain, complete or adequate remedy at law for the alleged wrongs of which they complain, and that the appellants would have had a right, as they now claim in Point I (p. 3) of their petition for rehearing that they had, to rely upon the decision of this court in the *Camunas* case in 1921 (*Camunas v. Porto Rico Ry. Lt. & P. Co.*, *supra*, 272 Fed. 924), and that that decision, as well as those in *West India Oil Co. v. Gallardo*, and *Porto Rico Mercantile Co. v. Gallardo*, *supra*, would be applicable and controlling.

**But the statutes of Porto Rico on this subject and the legislative policy thereby announced did not remain the same.**

By Act No. 9 of June 23, 1924, quoted at length in the opinion of this court, September 25, 1926, in these causes (Opinion, pp. 4-6), afterwards amended and elaborated by Act. No. 84 approved August 20, 1925, the Porto Rican Legislature not only expressly repealed the prior act of May 13, 1920, and substituted other provisions in lieu of it, but also, in so doing, completely changed the legislative policy of the Island in respect to suits for the recovery of protested taxes, and the basic nature of the remedy itself.

*Prior to 1924, all of the legislation on the subject, as above reviewed, (except only that relating to income taxes,—Act No. 80 of 1919, Appendix, infra, pp. 68-69, not affecting taxes such as these here in question), had evinced a policy of narrowly and jealously limiting the right of the taxpayer to sue for the reimbursement of taxes paid under protest. That legislation had consistently embodied the following principles, crystallized in the Act of May 17, 1920, viz.:*

*a. That money collected for protested taxes should be paid directly into the Insular Treasury, and be treated as other moneys belonging to the Insular Government; so that*

*b. Any suit to recover them (although it might be, in form, against the Treasurer) was necessarily in reality a suit directly against the People of Porto Rico; and*

*c. In case of a judgment in favor of the protesting taxpayer, the proceeds of the judgment had to be provided for out of the general tax levy (either by express appropriation, as provided by Section 8 of the Act of 1916; or by being deducted from the taxes collected for the next following year, as provided in the second paragraph of Section 8 of the Act of 1920); and*

*d. That, such a suit being a direct suit against the People of Porto Rico, that sovereignty consented to be thus sued only in its own courts (and not even in all those courts, but only, expressly, "in the proper district court"; Section 2, Act of 1920); and that, even there, the right of the taxpayer to sue was closely and jealously limited by the provisions (1) that he must file a bond to cover not only ordinary costs but also, in case of a decision against him, attorney's fees for the attorney of "The People of Porto Rico," not only for such attorney's work in the trial court (Section 4, Act of 1920), but also on appeal in the Supreme Court of Porto Rico (*ibid.*, Section 5); and (2) must also file with his suit a certificate not only that he had paid the protested tax, but that he had also paid *all other taxes* (Section 2, Act of 1920), and must keep that condition good, subject to the danger of forfeiting his right to proceed with the suit in case he failed to pay any other subsequently accruing taxes (Section 6, Act of 1920).*

*The Act of 1924 revolutionized all that. It evinced an exactly opposite legislative policy.*

It reveals the intention—elaborated and made even clearer by the Act of August 20, 1925, allowing interest at six per cent, as well as costs, to the taxpayer upon recovery of protested taxes—of providing a liberal remedy. It not only expressly repeals "all laws or parts of laws in conflict herewith," as well as said Act No. 17 of May 13, 1920 (Section 8, Act No. 9 of June 23, 1924, *supra*), but, as the latest expression of the legislative will on the subject, it necessarily repeals, or modifies, the general Act of 1916 (Act No. 76 of April 13, 1916, *supra*) concerning suits against the People of Porto Rico, in so far as any of the provisions of that Act may be in conflict with this later Act of 1924.

In contradiction to the Act of 1920 and the earlier Acts, the Acts of 1924 and 1925 expressly provide:

a. That moneys collected as protested taxes shall *not* be mingled with the general funds of the Porto Rican government in the Insular Treasury; but shall, on the contrary, be set aside and "covered into a special fund to be known as 'Taxes paid under protest—Trust Fund'" (Section 3, Act of 1924; *ibid*, as amended by Section 1, Act of 1925),

"to be there held until the final decision of a court of justice is rendered upon the legality of the collection of the taxes so protested, and likewise interest at the rate of six (6) per cent on the protested part shall be covered monthly into the said Trust Fund, taking the sum necessary therefor out of such moneys as may be available in the Treasury of Porto Rico, for which purpose the Treasurer of Porto Rico is hereby authorized and empowered to dispose of such moneys in the Treasury of Porto Rico";

so that the suit is no longer one "to transfer money from the Insular Treasury into the pockets of plaintiff", but is, in fact, as well as in form, simply a suit against the Treasurer personally, to be satisfied, in case of judgment for the complainant taxpayer, out of the moneys held in the defendant's hands in a trust fund especially for that purpose (instead of having to be paid, as under the earlier legislation, out of the general funds accruing from the general Government taxes).

That such a suit, which will not result in any claim against the general funds of the Insular Government, is not a suit against

the Government, but on the contrary, a personal suit against the individual defendant Treasurer, is well settled.

It has been so ruled by the Supreme Court of Porto Rico in the *Serralles* case, *supra*; a case which appellee submits, being a construction of an analogous Porto Rican statute by the highest Insular tribunal, is controlling as to the Insular courts' construction of these Acts of 1924 and 1925, and will, therefore, for the purposes of the inquiry now before us,—viz., whether they authorize suits in the Federal courts as well as in the Insular courts,—be accepted and followed by this court.

In the *Serralles* case, the Porto Rico Supreme Court expressly holds that an action for the refund of income taxes, brought against the Treasurer of Porto Rico under Sections 55 to 63, and 66, of Porto Rican Act No. 80 of June 26, 1919, analogous to said Acts of 1924 and 1925; *although not providing, as those Acts do, for holding the protested tax moneys in a "trust fund,"* —is (a) *not* controlled by the general act of 1916, *supra*; and (b) *not* a suit against the People of Porto Rico.

*Serralles v. Treasurer of Porto Rico*, 30 P. R. R. 220, 222-223 (Appendix, *infra*, pp. 77, 78-80.)

*As above stated, appellee submits that the Serralles case is applicable, and controlling, as to the interpretation to be placed upon the Acts of 1924 and 1925.*

*See also*, that suits against the Treasurer under those Acts, to recover protested tax moneys *held by him in the trust fund there provided*, and not in the Insular treasury (so that "the financial status of the treasury" is not involved), are not suits against the People of Porto Rico,

*Osborn v. Bank*, 9 Wheat. (22 U. S.), 738, 857.

*Jumel v. Louisiana*, 107 U. S. 711, 724, 271.

*Lankford v. Platte Iron Works*, 235 U. S. 461, 470 (McKenna, J.).

*Camunas v. N. Y. & P. R. S. S. Co.*, 260 Fed. 40, 48 (Anderson, J.).

b. That the complainant taxpayer may

"sue the Treasurer of Porto Rico in a court of competent jurisdiction, to secure the return of the amount protested" (Section 4, Act of 1924; *ibid*, Act of 1925),

and that (Section 5, Act of 1924) "*Either party may appeal to a higher court*"; that (Section 7) the sum of \$15,000 or such part thereof as may be necessary "is hereby appropriated" out of any funds in the Insular Treasury not otherwise appropriated, for the payment by the Treasurer of such costs "as by judgment of any competent court" may be allowed to any taxpayer who shall have brought suit under that act.

It will be observed how carefully, all through this Act, the Legislature avoided the use of any terms specifically indicating the Insular courts; in sharp contrast with the express provisions of prior legislation that the suit should be "in the proper district court," with appeal to the "Supreme Court" (Act of 1920), and expressly, "in the Insular courts" (Act of 1916) as above quoted.

*It must be presumed that the Legislature*, in thus changing this phraseology, and carefully avoiding the use of the terms which it had used in the earlier acts specifically referring to the Insular Courts, *did so with deliberate purpose to change the policy of the statute*, and to avoid limiting to the Insular Courts a taxpayer who might otherwise have the right to sue in the Federal Court.

c. Instead of the payment of a judgment recovered by the taxpayer being made subject to subsequent appropriation by the Legislature from general funds for its payment (Section 8 of the Act of 1916), or being required to await refunding by the Treasurer out of general taxes collected in the following year (second paragraph of Section 8 of the Act of 1920), this Act of 1924 provides (third paragraph of Section 4, Act of 1924, and second paragraph, *ibid*, Act of 1925):

"When final decision is rendered, if favorable to the taxpayer, the Treasurer of Porto Rico shall proceed to return to him the amount directed in the decision, to be charged against the fund 'Taxes paid under protest—Trust Fund,' referred to in Section 3 hereof,"—

and, under the Act of 1925,—

"plus interest on such amount at the rate of six (6) per cent, a year, to be computed from the date on which payment under protest was made to the date on which actual return is made by the Treasurer to the taxpayer of the amount directed by the court to be returned."

d. Instead of the prior jealous limitations upon the taxpayer's right to sue (the requirements of the prior Acts hereinbefore noted that he should file with his complaint a certificate not only of the payment of the protested taxes but that he had paid *all other taxes*, and that he should also keep that condition good pending the suit by paying all other taxes, subject to forfeiture of his right to proceed further with the suit for the protested taxes, and that he should also be required in case the suit went against him to pay not only costs but also attorneys' fees for "The People of Porto Rico" both in the District Court and in the Supreme Court on appeal), the Act of 1924 provides only that the taxpayer, on filing suit against the Treasurer, shall attach the receipt for the taxes paid under protest, or a certified copy of it (Section 6). No bond whatever is required on filing the suit, and there is no provision for his being assessed for attorneys' fees in case the suit should go against him.

The provisions in the Act of 1924 to which reference is made on pages 6 and 7 of appellants' petition for rehearing concerning the time within which the taxpayer must begin his suit and the time within which he must appeal, and referring to the procedure on the suit and the appeal, are not inconsistent with the right to sue in the Federal Court, and do not confine the suit to the Insular Courts.

a. The provision (Sections 4 and 5, Act of 1924, *infra*, Appendix, p. 64, 65), limiting the time within which the taxpayer must begin the suit or take an appeal, are equally applicable whether the suit be in the Insular Court or in a Federal Court. In either case the limitation does not act on the court, but only limits the length of time for which the Treasurer must hold the protested tax money in the trust fund awaiting the action of the taxpayer. If the suit is not begun, or the appeal taken, within the time limited, the Treasurer will cover the money into the Insular Treasury, and there will no longer be any trust fund available to meet the judgment of the court. The situation is exactly analogous to an ordinary escrow between private persons directing the escrow holder to hold the deposited moneys for a certain length of time and then to pay them over in a designated way if no suit has been begun to determine their proper disposition. No one would suggest that the parties to such an escrow agree-

ment had any power, or were in any way attempting, to control the procedure of the court. The situation is the same here.

b. The procedural provisions (e. g., second paragraph of Section 4, that the court before which the action is pending shall fix the day for the trial without the necessity of a request from the parties, and the second paragraph of Section 5, that the "court of appeals" shall hold the hearing with preference over any other matter pending before it) are manifestly intended simply to regulate the procedure if it shall happen to be in an Insular Court; and, in case it shall happen to be pending in a Federal Court, then the only effect of these clauses is that, in accordance with the usual rule as to actions at law in Federal Courts, the Federal Court will, in so far as it can, consistently with Federal statutes and its own organization and general principles of procedure, follow the law of the State in which it sits. No reason appears why in a case where, if the court were sitting within one of the States of the Union, the law of the State would control the procedure in a common law action, the same principle should not be applied, by analogy, to the procedure of the Federal District Court of Porto Rico, especially when the procedure, such as the expediting of the action contemplated by these sections of the Act in question, is for the benefit of the individual litigant (the taxpayer here) who must be interested in prosecuting the case to a finish and not allowing it to linger in the court, and hampering the collection of the taxes of the government in which he, as one of the citizens and taxpayers, is interested like all other citizens.

Certainly there is nothing in these procedural directions overruling the general legislative intention that the suit may be in any "court of competent jurisdiction" (Section 4, Act of 1924; *ibid.*, Act of 1925), including the Federal Court.

It may be worth noting that in the second paragraph of Section 5 of the Act of 1924 dealing with appeals, the legislature carefully uses the phrase "the court of appeals," instead of the specific term "the Supreme Court" which it had used in Section 5 of the Act of 1920. There is no Insular court denominated "the Court of Appeals"; so that it is very plain that the legislature in changing the phrase from "the Supreme Court," which specifically named the Insular Court, to the phrase "the court of appeals," which was not the title of any Insular Court, intended to make the Act broad enough to cover any court, whether Insular or Federal, to which the appeal might be taken.

It is well settled that, in a suit against an individual official, wherever a right of action exists in the State courts, the same right of action exists in the Federal courts in favor of one otherwise entitled to sue in the Federal Court. No consent by the State is necessary to the existence of such Federal right of action.

*Confer, Smyth v. Ames, 169 U.S. 466, 516.*

The administrative authorities in Porto Rico, including the Treasurer, appellee here, have administratively considered the Acts of 1924 and 1925 as, without question, authorizing the filing of suits in the Federal Court when there is diversity of citizenship or other grounds of Federal jurisdiction, and the Federal District Court of Porto Rico has, under those Acts of 1924 and 1925, taken jurisdiction, without objection from the Treasurer of Porto Rico, in several cases of suits brought for the recovery of taxes paid under protest. One such case is that of *West India Oil Company v. Gallardo*, now pending in this court on appeal (with names reversed), No. 2047, October term, 1926, of this court. There are several other cases now pending before the Federal District Court of Porto Rico for recovery of taxes paid under protest, in none of which has any objection been made, either by the Treasurer, or by the court itself, to the jurisdiction of that court.

*In view of this radical change in the law since the decision of the Camunas case (Camunas v. P. R. Ry. Lt. & P. Co., 272 Fed. 924, supra) appellants had no right to rely, as they say they did (Petition for Rehearing, p. 3), on the decision of this Court in that case, in 1921, in bringing these suits.*

Even if it should be held that under the Acts of 1924 and 1925 the remedy of the protesting taxpayer is limited to suit in the Insular Courts and that, therefore, that remedy does not provide, technically, "a plain, adequate and complete remedy at law" within the meaning of Section 267 of the Judicial Code, so that there is jurisdiction of the suit in equity, it by no means necessarily follows that, because equity has jurisdiction, it will interfere by injunction with the collection of taxes due to the government of Porto Rico. It is too well settled to require citation of authorities that:

a. The question of the existence, or not, of a "plain, adequate, and complete remedy at law," either under Section 267 of the Judicial Code or under the general principles of equity jurisdiction, *goes only to the jurisdiction in equity.*

b. Even though equity may have jurisdiction, it does not necessarily follow that injunction will issue.

c. The issuance or not of the writ of injunction is always within the sound of judicial discretion of the court.

d. The writ of injunction will not ordinarily issue to enjoin the collection of taxes upon which the existence and proper functioning of a government depends;

*except* in a very plain case, and under exceptional circumstances.

Petitioners do not here show circumstances sufficient to take this case out of the general rule.

There is, therefore, nothing in the opinion of this court of September 25, 1926, in these causes, in any way at variance with the decision of the Supreme Court in *Risty v. C. R. I. & P. Ry. Co.*, 270 U. S. 378, as claimed (p. 3) in the petition for rehearing; because (a) the remedy of the taxpayer for the recovery of protested taxes under the Acts of 1924 and 1925 is not limited to the Insular Courts, and (b) even if it were so limited it does not necessarily follow that injunction would issue. In the *Risty* case the court does not even hold that the mere fact that the taxpayer's statutory remedy is limited to the State courts would, in itself alone, give jurisdiction in equity. The Supreme Court in that case adds, significantly:

*"The legal remedy under the State law being uncertain, the Federal court has jurisdiction in equity to enjoin the assessment"* (*Risty v. C. R. I. & P. Ry. Co.*, *supra*, 270 U. S. at p. 389).

### III

The decision of this Court, September 25, 1926, in these causes is not in any way at variance with the decisions of the Supreme Court, or with the former decisions of this court, cited under Point III, pp. 3 to 4, of Appellants' Petition for Rehearing.

Those cases cited by appellants are:

Hill v. Wallace, 259 U. S. 44, 62.  
Union Pacific R. R. Co. v. Weld County, 247 U. S. 282.  
Ohio Tax Cases, 232 U. S. 576, 587.  
Benedicto v. West India & Panama Telegraph Co., 256  
Fed. 417, 421.  
Benedicto v. Porto Rican & American Tobacco Co., 256  
Fed. 422, 425.

Examination of the opinions of the courts in those cases will show that none of them is at variance with the fundamental rule that, as it has been stated by this court heretofore,

"it requires no discussion or citation of authorities to show that only a very plain case would warrant a court of equity in issuing an injunction tending to cripple a government in the collection of taxes necessary for its existence and performance of its essential public duties"

Camunas v. N. Y. & P. R. S. S. Co., 250 Fed. 40, 50 (Anderson, J.), June 3, 1919;

which is the same rule followed and applied by this court in its opinion (pp. 6-8) of September 25, 1926, in these causes. All of the cases relied upon by appellants are cases of wholly exceptional circumstances, following the principles enunciated in the leading case of *Ex parte Young*, 209 U. S. 123, where the court said (at p. 146):

"But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws" (quoting from Mr. Justice Brewer's opinion in the earlier case of *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 100).

An examination of appellants' cases will show that in each of them there were unusual circumstances taking the case out of the general rule. There are no such circumstances in this case. The statutes here in question announce no unusual penalties, and evince no attempt on the part of the legislature to burden in any way any challenge thereof in the courts. The provisions for the collection of these taxes are simply those provided for the collection

of taxes generally. It is provided (Section 62, Act of 1925) that the sales tax shall be payable only once a month, and that (Sections 79, 80, 81, and 102, Act of 1925) any one failing to comply with the requirements of the Act shall be guilty of a "misdemeanor," and that (Sections 78 and 103, Act of 1925) any one guilty of such misdemeanor may be punished by "administrative fine" by the Treasurer of not more than \$25.00, (Section 75, Act of 1925), or by fine of not less than \$100 nor more than \$1,000 or to confinement in jail for a term of not less than thirty days or more than one year, or for the second and each subsequent offense both penalties, fine, and imprisonment. For failure to pay the tax on the monthly sales no further penalty is attached, except the addition of 10 per cent of the amount due (Section 77, Act of 1925), and the Treasurer is directed to collect this tax in the same manner as other taxes are collected (Section 105, Act of 1925). There are here none of the unusual features which have moved the courts to interfere with the collection of taxes by the strong arm of injunction. There is, for instance, no provision making failure to pay on each individual sale an individual offense, or multiplying the penalties, and no provision for closing the place of business or forfeiting the property involved because of failure to pay the tax; or making the tax a lien on real estate so as to cloud the title; nothing whatever to impede any taxpayer from having his remedy by paying the taxes under protest and suing to recover, in the meanwhile carrying on his ordinary business undisturbed. That is, in fact, just what these complainants are doing at present. They are paying the tax to the Clerk of the District Court under the orders heretofore entered in these causes, and are carrying on their businesses while this litigation is in progress. They would be in no different position if they were paying to the Treasurer every thirty days, and putting their suits of record at law to recover the protested taxes. That would not involve any such "multiplicity of suits" as to be a burden. It cannot be presumed that it would require more than a few months, perhaps a year, for the matter to be determined on such a suit at law; so that, at most, any individual taxpayer would only be required to file perhaps ten or twelve consecutive suits at law, to lie in the Clerk's office undisturbed pending the determination of his first suit. That, practically, cannot be said to be any such hardship

as to make it necessary to interfere by injunction with the collection of the Insular taxes.

Especially does this appear to be true when one remembers the general principle that, as this court has heretofore said, *arguendo*,

"it is manifestly undesirable that a Porto Rican statute should receive its first judicial construction in the Federal court";

although, as the court said in that case, the Federal court may not on that ground alone refuse relief to the plaintiff, *if he is otherwise clearly entitled thereto*.

*Camunas v. N. Y. & P. R. S. S. Co.*, *supra*, 260 Fed. 40, 48.

Appellants contend (Point IV, pp. 2, 12-14, Petition for Re-hearing) that this court "has overlooked" (alleged) "essential differences between these causes and *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, and *Dodge v. Osborn*, 240 U. S. 118, and *Long v. Norman*, 289 Fed. 5, and has erroneously applied the principles of those decisions."

It is believed that what has already been said in this brief in the foregoing points disposes of this contention. There is here no irreparable injury threatened to these appellants, no penalties denounced by the statutes or action threatened by the defendant which will seriously burden appellants in case they seek by an action at law to challenge their liability for these taxes, and no "multiplicity of suits" of a burdensome nature, at all commensurate with the injury that would be done to the People of Porto Rico by tying up a substantial part of the tax income of the Island by injunctions in these causes. As before observed (*supra*, p. 24), in case the decrees of the court below dismissing these suits be affirmed, and appellants pay the taxes under protest and sue for their return with 6 per cent interest, under the Act of 1924, as amended by the Act of August 20, 1925, they will be, for all practical purposes, in precisely the same situation in which they are now. The only difference at all will be that, instead of having paid the tax money into the hands of the Clerk of the Federal District Court to be held by him pending the litigation, they will have similarly paid it into the trust fund in the hands of the Treasurer of Porto Rico, with the additional advantage to them that it

will then be drawing 6 per cent interest for their benefit in case they shall ultimately be held entitled to its return.

At the risk of undue prolixity, we venture to call the court's attention to the fact that the taxes here are not "paying day by day and in many cases upon many transactions during one day" as stated on page 12 of Appellants' Petition for Rehearing. The statutes here in question provide, as hereinbefore pointed out (p. 23, *supra*), that the taxes shall be paid *monthly*. Therefore no payment is required "day by day." We venture to append a copy of the regulations of the Porto Rico Treasury Department, under these statutes; which are recognized as part of the public law of the Island by the last clause of Section 94 of the Act of 1925, and of which it is therefore believed this court may take judicial notice. We also invite the court's attention to the fact that it appears from the record of these causes that the *statement is only required* to be made by the taxpayer *once a month* at the end of the month, stating the articles sold during that month and the selling price; the tax is then computed by the Internal Revenue Division of the Treasury Department *and the tax thus computed is paid in one single payment*. This is the law, and this has been the practice of the Treasury Department of Porto Rico, and, in accordance with that practice, in the order of the District Court granting the supersedeas in these cases it was directed that these taxpayers, appellants, are required and ordered to pay *monthly* the amounts of taxes due according to the examinations made by the Treasury Department (Trans. of Rec. Case No. 1944, pp. 64, 65).

It thus appears that the statement of appellants (p. 12, Petition for Rehearing) that

"the multiplicity of suits would be so great and so expensive as almost to force at least many of the appellants to abandon their legal rights. If they do *not* abandon them, then this court instead of having forty of such cases upon its docket will have approximately *forty hundred*,"

*is absolutely unsound and baseless.*

Appellants contend (Petition for Rehearing, Point V, pp. 4, 14-15) that:

"the Act of June 23, 1924, referred to in the opinion, does not provide for interest."

Appellants, in this contention, entirely overlook the effect of the amendatory act of 1925 (Act No. 84 of August 20, 1925) providing for payment of interest at 6 per cent, to which they themselves refer. There is nothing whatever in that Act limiting its effect to taxes which accrued prior to its date. It is an amendment of the Act of 1924, and the provision as to payment of interest is inserted, by the amendment, at the end of Section 3 of the 1924 act. The portion of the section pertinent to the payment of interest reads:

"Section 3.—The moment that a tax paid under protest is received, \* \* \*. The protested part shall be covered into a special fund to be known as 'Taxes Paid Under Protest—Trust Fund,' to be there held until the final decision of the court of justice is rendered upon the legality of the collection of the taxes so protested, and likewise interest at the rate of six (6) per cent of the protested part shall be covered monthly into the said trust fund, taking the sum necessary therefor out of such moneys as may be available in the Treasury of Porto Rico, for which purpose the Treasurer of Porto Rico is hereby authorized and empowered to dispose of such moneys in the Treasury of Porto Rico."

Manifestly, upon the dismissal of these causes by the District Court as heretofore ordered by this court in its judgment of September 25, 1926, the tax money involved in all of these cases,—regardless of the date when the taxes originally accrued or when these injunction suits were started,—will then be paid, for the first time, to the Treasurer. That will be the date, and the only date, of payment to him. And in case that payment be made under protest, then, by the express terms of this Act of 1925, as above quoted, the interest at 6 per cent will begin to run from that "moment."

*There is nothing whatever in this claim of appellants.*

## VI

Appellants suggest (Petition for Rehearing, Point VI, pp. 4, 15-17) that:

"The judgments which this court has entered are such that the appellants cannot effectively pursue their alleged remedy

at law, and there is grave danger that they will be forced to suffer a huge money loss merely because they relied upon this court's decision in the *Camunas case*, cited *supra*."

As we have said appellants "suggest" this. It cannot be that they mean to say to this Court that they really are seriously afraid that (Petition for Rehearing, pp. 16-17)

"the collector to whom the money is paid will take the position that the appellants have not brought themselves within the literal terms of the statute and refuse to give the required receipt with the necessary indorsements showing the protest. Or, it may be contended that payment was made when the money was deposited, and an action to recover it may fail because not brought within thirty days. There is danger, too, that the Insular courts may sustain one or the other of these positions. We do not say that such position would be sound. We *do* say it might be taken and sustained."

*It surely is not necessary for us to say to this Court that the Insular authorities do not desire to trick appellants out of their money; and would not be in position to do so even if they wished. We submit that there is no possible way in which the order of the court below (R. 64, 65, Case No. 1944), directing these appellants to deposit the moneys with the Clerk of the Court, could be twisted into a payment to the Treasurer. It is not so on its face, and therefore is not so at law. It was not so intended, and therefore could not be so treated in equity. And this court will not presume that the Insular Courts will take position so wholly at variance with right and justice and with the intention of the parties, and so wholly unjust to their own citizens and taxpayers. Moreover, this Court and the Federal District Court are in position specifically to protect appellants in this regard. It is only necessary to so frame the order directing the moneys to be paid out by the Clerk of the District Court as to assure that they shall only be so paid in the name of the appellants, under protest; and only upon receiving against them receipts in proper form, in accordance with the Acts of 1924 and 1925, to become the basis of suits for the return of the protested taxes and interest, and specifically showing that the payment is made to the Treasurer on, and receipted for him by him as of, the date on which the money is actually turned over to him.*

## APPENDIX V.

DEBATE IN THE UNITED STATES SENATE, FEBRUARY 28, 1927,  
UPON THE THEN PROPOSED AMENDMENT OF SECTION 48 OF THE  
ORGANIC ACT OF PORTO RICO, NOW ENACTED AS SEC. 7 OF THE  
ACT OF MARCH 4, 1927 (44 STAT., CH. 503, PP. 1418, 1421).

68 CONG. REC., 5025-5026.

"MR. BINGHAM. Mr. President, at the request of the Delegate from Porto Rico I desire to add another amendment on page 11, after line 20, as a new section. I send it to the desk and ask to have it read.

THE PRESIDENT PRO TEMPORE. The amendment will be stated.

MR. BINGHAM. I will say for the information of the Senate that the first paragraph of the new section is now in the law; and the second paragraph merely makes the general statutes of the United States apply to Porto Rico, so far as securing injunctions against the payment of taxes is concerned. In other words, the general statutes now do not apply to Porto Rico in this regard, but apply only to the United States.

THE PRESIDENT PRO TEMPORE. The amendment will be stated.

THE CHIEF CLERK. After line 20, on page 11, it is proposed to add a new section, as follows:

Sec. —. That section 48 of said act be, and the same is hereby, amended to read as follows:

"Sec. 48. That the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the district courts of the United States, and the district courts may grant writs of mandamus in all proper cases.

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the district court of the United States for Porto Rico."

MR. WADSWORTH. Mr. President, that would seem like a rather important amendment, especially the last sentence.

MR. McKELLAR. May it be read again?

**THE PRESIDENT PRO TEMPORE.** The amendment will be restated.

**THE CHIEF CLERK.** It is proposed to add, after line 20, page 11, the following:

That section 48 of the said act be, and the same is hereby, amended to read as follows:

"Sec. 48. That the supreme court and district courts of Porto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the district courts of the United States, and the district courts may grant writs of mandamus in all proper cases—

**MR. BINGHAM.** That is now the law. There is no change in that.

**THE CHIEF CLERK** (continuing):

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the district court of the United States for Porto Rico."

**MR. ROBINSON OF ARKANSAS.** Mr. President, what is the change in the existing law?

**MR. BINGHAM.** In answer to the question of the Senator from Arkansas, I will state the change in the existing law is this: The organic act of Porto Rico did not carry to Porto Rico the general statutes of the United States.

Consequently, it has been possible and has proved an extremely dangerous thing in the government of Porto Rico for taxpayers to secure an injunction against paying Porto Rican taxes in the court of the United States, in the district court of the United States for Porto Rico; and thereby, instead of following our practice—which is to pay the tax first and then take an appeal—they do not pay the tax at all. They get injunctions against paying the tax; and I have seen in one of the publications the statement that at one time there was over \$2,000,000 of uncollected taxes held up by injunction. This amendment is to apply the same rule in Porto Rico that now applies on the continent of the United States.

**MR. WADSWORTH.** May I ask the Senator from Connecticut, is this amendment perhaps the result of a decision or a series of decisions of the circuit court of appeals sitting at Boston?

MR. BINGHAM. No; it is caused by the fact that the district court of Porto Rico has repeatedly granted injunctions against the payment of taxes.

MR. WADSWORTH. On the ground that they were illegally assessed?

MR. BINGHAM. For one reason or another. The treasurer of Porto Rico has been unable to collect the taxes levied, as can be done in any other part of the United States. There the treasurer can collect, and then if there is any difficulty about it the matter is brought before a court; but under the present law, since the general statutes of the United States do not apply to Porto Rico, the taxpayer can get an injunction; and the taxes the collection of which was restrained by those injunctions amounted, at one time, to more than \$2,000,000.

MR. WADSWORTH. Assuming that this amendment becomes law, what recourse has the taxpayer?

MR. BINGHAM. The courts; the same that he has on the continent of the United States.

MR. WADSWORTH. Which courts?

MR. BINGHAM. The Porto Rican courts and the Federal court.

MR. WADSWORTH. No; not the Federal court. That is the point. The Federal court is taken out of it.

MR. BINGHAM. This is not a Federal tax. This is in regard to Porto Rican taxes.

MR. SHORTRIDGE. Mr. President, if the Senator will yield, does the amendment deny to the courts their jurisdiction to grant an injunction as against illegal taxes?

MR. BINGHAM. It will make the condition just the same as in the United States.

MR. SHORTRIDGE. It, then, does give the court the jurisdiction to enjoin?

MR. NORRIS. There is another provision, however. There is ample provision made, as I understand the law, for the return of taxes that are illegally paid.

MR. BINGHAM. Oh yes; there is no question about that.

MR. NORRIS. But they can not get it by way of injunction.

MR. SHORTRIDGE. In other words, they must pay under protest and then bring appropriate proceedings to recover?

MR. BINGHAM. Yes; as in many of our States.

THE PRESIDENT PRO TEMPORE. The question is on agreeing to the amendment offered by the Senator from Connecticut.

The amendment was agreed to.

Cong. Record, Vol. 68, Part 5, pp. 5025-5026, Senate, February 28, 1927.

## APPENDIX VI.

STATEMENTS OF GOVERNOR TOWNER OF PORTO RICO, OF MAJOR GENERAL FRANK MCINTYRE, CHIEF OF THE BUREAU OF INSULAR AFFAIRS, AND OF HON. FELIX CORDOVA DAVILA, DELEGATE FROM PORTO RICO TO THE HOUSE OF REPRESENTATIVES, BEFORE THE HOUSE COMMITTEE ON INSULAR AFFAIRS IN THE HEARINGS ON H. R. 4085 AND H. R. 11846, MAY 4, 5 AND 11, 1926, PP. 5, 6, 8-9, 10-11, 63-65.

GOVERNOR TOWNER. "The next section that is amended is the provision on page 8, section 6. This provision extends to Porto Rico the provisions that exist in the United States law in regard to the granting of interlocutory or preliminary injunction suspending, or restraining the enforcement, or execution, of various laws, especially tax laws. The provision in the United States statute upon this subject is that no United States judge shall grant these injunctions unless he has called to his assistance two other United States judges, so that they may have the concurrent action of the three, or, the majority of the three, before an injunction which restrains an administrative act provided by law shall be granted. The general rule with regard to these laws passed by the United States is that all laws that are not inapplicable to Porto Rico shall be considered as applying to Porto Rico. This question arose in one of the courts as to whether or not this law should apply to Porto Rico, and the court decided that it could not be held that this law should apply to Porto Rico, or was intended to apply to Porto Rico, for the reason that there were not three United States judges in Porto Rico, and, therefore, it would be practically impossible to make the law workable. We have only one United States judge in Porto Rico, and, therefore, the law they held could not be said to have been intended to apply to Porto Rico. Now, in order to obviate this difficulty we have provided that United States judge shall not have the right to grant these injunctions restraining the collection of taxes or matters of that sort until he has called to his assistance in the same way that is provided in the States, two judges of the Supreme Court of Porto Rico. I should perhaps say that the judges of the Supreme Court of Porto Rico are all appointed for life by the President of the United States. Now, that would grant to Porto Rico, in effect,

the same right that is now granted in the United States. So that, they could not interfere with the execution of a law without they had first presented an application to a United States district judge, and we have one in Porto Rico, and he has called to his assistance two of the members of the Supreme Court, there being five members of the Supreme Court, and they, or a majority of them, should have concurred in that proposition. So far as I know, there is no objection I believe, to that provision. Are there any questions that any members of the committee desire to ask me concerning the measure?" (p. 5).

\* \* \* \* \*

"MR. SABATH. Speaking about the duties of the auditor and also of the right to grant injunctions, it is true that there are individuals and corporations, numbers of them, in Porto Rico, who are in arrears in their taxes?

"GOVERNOR TOWNER. Yes.

"MR. SABATH. What is that due to?

"GOVERNOR TOWNER. That has occurred in this way: A large number of the large taxpayers of the island went to the United States court, and obtained temporary injunctions stopping the payment of their taxes.

"MR. SABATH. Individuals and corporations, or principally corporations?

"GOVERNOR TOWNER. Principally corporations; and the worst of it was that it was impossible for the Government to bring them to trial. But now, conditions have changed, and the laws, the present laws, have been sustained by the courts in so far as they have been submitted, and most of that opposition has been withdrawn, and now we are collecting the taxes.

"MR. THURSTON. You are collecting the taxes now?

"GOVERNOR TOWNER. We have been collecting the taxes. Since the 1st of January we have had no difficulty in collecting the revenue, and we have been able to pay all the budgetary expenses, and have paid over \$500,000 of the current indebtedness that was incurred because of the failure to collect the taxes.

"MR. THURSTON. Then, the amount of taxes that they have refused to pay has reached the minimum, and your trouble is about eliminated?

"GOVERNOR TOWNER. Yes, sir; that trouble is about eliminated and we are now collecting the taxes rapidly and satisfactorily" (p. 6).

. . . . .

"MR. HARE. With reference to section 41, can the Federal judge who calls in to sit with him on an injunction proceedings two members of the supreme court, name those members himself, or, would it be up to the members to name the two members of the court who were to sit with him or, would he call on the chief justice to name the two members?

"GOVERNOR TOWNER. I think the language is exactly the same language that is used in the present United States Statute. Of course, that is a matter of arrangement that has to be taken up later, so as to get those judges who could act and who could sit, but I think the language of the act is exactly the same here as in the United States statute.

"MR. HARE. I understand that, but I just wanted to know what you thought would be the practice?

"GOVERNOR TOWNER. I think the practice is for the judge to make the selection himself.

"MR. HARE. For him to make it himself?

"GOVERNOR TOWNER. To make it himself, yes.

"MR. HARE. Don't you think it would be better to ask the chief justice to name the two members?

"GOVERNOR TOWNER. There certainly would be no objection to it, and perhaps it might be claimed that that would be too much of an extension or too much of a change. For instance, this is really an extension of the United States law to Porto Rico, and we are trying to make it just as nearly analogous to the United States law as it is possible to do. Now, as we did not have three district judges to act in cases of that kind, we are using the same process that is used in the United States, in so far as it is possible, but instead of taking two United States district judges of the United States as associates to sit in these cases we have to get them from the Supreme Court of Porto Rico.

"MR. HARE. The only question that has arisen in my mind is that he might attempt to select two members of the supreme court where it would be emergency, where they could not be

spared from their duties, or you would have to go to the chief justice to find out who would be available anyway.

"GOVERNOR TOWNER. I do not think there would be any difficulty in so arranging it.

"MR. THURSTON. Do the members of the supreme court act as trial judges in their different duties as supreme court judges?

"GOVERNOR TOWNER. No; it is strictly an appellate court. The members of the court are very eminent men, and it is a court of very high character, I may state (pp. 8-9).

\* \* \* \* \*

"MR. THURSTON. Just one question about your expenditures and income over there. Do you get enough revenue there to meet your expenditures readily?

"GOVERNOR TOWNER. Yes, we are now, but we had a great deal of difficulty until lately with regard to that matter.

"MR. THURSTON. What brought about the change?

"GOVERNOR TOWNER. Two things. In the first place we increased the revenue, and, in the next place, we got the court to decide the tax cases which had been pending, and which were decided favorably to the Government and now the money is coming in from them, so that we are now paying up our deficit, and we are now having a balanced budget. So far as our present position is concerned it is entirely satisfactory and our revenue is sufficient to meet our expenses.

"MR. THURSTON. Do you expect a continuance of that condition?

"GOVERNOR TOWNER. I think so. I do not know of any reason why it should not continue.

"MR. THURSTON. Was this deficiency caused by those parties holding back those taxes?

"GOVERNOR TOWNER. Yes.

"MR. THURSTON. You may have brought this out, I do not know. On what ground did they hold back those taxes?

"GOVERNOR TOWNER. They went into the United States Court and obtained injunctions merely upon the allegation, or practically upon the allegation that the law was illegal and unconstitutional. A temporary injunction was granted which, so far

as our purposes were concerned, almost amounted to a permanent one, because, notwithstanding our attempts and efforts to collect and bring those cases to trial we were not able to do so until within recent months. Under the new conditions the cases were decided in favor of the Government, so far as our present revenue laws are concerned.

"MR. THURSTON. What was the nature of those taxes involved?

"GOVERNOR TOWNER. Almost every tax imposed was contested in those cases. The income tax, especially the retroactive feature of the income tax, and the sales tax, and the excise tax that was imposed—the sugar tax, and, well, I think practically every tax was more or less involved.

"MR. WILLIAMS. You have a sales tax down there?

"GOVERNOR TOWNER. Yes.

"MR. WILLIAMS. How long have you had a sales tax in Porto Rico?

"GOVERNOR TOWNER. It went into operation this last year.

"MR. WILLIAMS. What do you think of the workings of it?

"GOVERNOR TOWNER. Well, so far it has been very satisfactory. I think we will have to modify the terms of our law somewhat, but it has certainly been a revenue producer, and, while it was violently opposed in the courts it has been sustained by them both in the United States courts and in the insular courts.

"MR. WILLIAMS. Did the people accept it agreeably?

"GOVERNOR TOWNER. Yes, the people accepted it, but the merchants objected to it particularly.

"MR. WILLIAMS. They had no complaint?

"GOVERNOR TOWNER. After a while they began to realize that it was possible to make the customers pay for it, and when they found that out their objection largely ceased (pp. 10-11).

\* \* \* \* \*

"GENERAL MCINTYRE. Section 6 is a section which affects principally the United States District Court of Porto Rico, and the feeling of the War Department was that we could not make a recommendation affecting that without taking it up with the Attorney General who would in turn take it up with the judge of the District Court of Porto Rico and, in view of that fact, a

report of this section at this session of Congress would be practically impossible and, therefore, the department recommended to me that that be omitted from this bill which it was hoped could be passed at this session of Congress. It was hoped that the bill could be passed or, at least, reported out in a satisfactory way at this session, and in order to avoid this delay, without criticizing this measure in any way, because the criticism would have to come from the district judge and the Attorney General, we thought we would just strike that out.

"THE CHAIRMAN. I should just like to add to your statement a paragraph in the Secretary's letter :

" 'In certain tax cases, now pending in the Circuit Court of Boston, the Attorney General of Porto Rico has pleaded that section 3224 of the Revised Statutes is now in effect in Porto Rico. Unless the proposed bill is passed at this session, this question will probably be decided before the next session of Congress.'

"GENERAL MCINTYRE. Yes; that refers to this first bill. I think it is taken out of the second bill.

"MR. DAVILA. Yes; because we came to an understanding.

"GENERAL MCINTYRE. You see in those tax matters, the Attorney General pleads that this section now applies in Porto Rico, and that is taken out of this section 41a.

"THE CHAIRMAN. The attitude of the War Department is that they can not—

"GENERAL MCINTYRE. We feel that it would be impossible for you to report this out with the necessary information at this session, if it contained this clause, because we feel that the Attorney General should pass on that, because it provides not only that two judges of the supreme court should be called in, but there is no way provided in this for calling them in. Now, when the district judge of Porto Rico could invite in two judges he should select, these judges of the supreme court being appointed by the President, we feel it would probably be required that the President or the Attorney General should designate in these cases two judges who should sit with the District Court of Porto Rico.

"MR. WILLIAMS. Your idea then is to strike out the section 6 of that section of this bill?

GENERAL MCINTYRE. Yes; we think it ought to be a separate bill, because we feel that it would necessarily delay any action you contemplate taking now.

"MR. WILLIAMS. That could be attended to at the next session of Congress by a separate bill.

"GENERAL MCINTYRE. That is what we thought (pp. 63-64).

\* \* \* \* \*

"MR. DAVILA. This amendment is a very important one for Porto Rico, and it is in accordance with the practice in the United States. Here in the United States when the constitutionality of a law is discussed it is necessary that three judges in the appellate court should decide whether or not a preliminary injunction will be issued.

I do not see the necessity of consulting the Attorney General. But it may be wise to have the benefit of his views. To my mind this is a very easy matter. We only want to apply to Porto Rico in a practical way the law in force in this country. Why should the Federal judge in Porto Rico grant a preliminary injunction when the constitutionality of a law is in issue? Why should he stop the payment of taxes on a preliminary injunction? I do not believe that is right, and the only thing we ask is to be protected by having two judges of the Supreme Court of Porto Rico that are appointed by the President of the United States to join the Federal judge in considering petitions for interlocutory and preliminary injunctions when the constitutionality of a law is in issue.

"MR. WILLIAMS. And your Government is certainly embarrassed?

"MR. DAVILA. Yes, by this injunction. Of course, it is not done now because we have a very good judge but it was done in the past and we need to be protected for the future.

"MR. UNDERHILL. Your section 6 meets the General's objection in that it specifically provides that the other two judges shall be the supreme court judges that are now resident in Porto Rico.

"MR. DAVILA. Yes; two supreme court judges that are now residents of Porto Rico appointed by the President.

"MR. WILLIAMS. I understand all the members of the committee are familiar with this and that you are going to appoint a subcommittee.

"THE CHAIRMAN. That is true. I think Mr. Davila will agree with us that a matter that is as important as this is should be reported to the Attorney General, because the Secretary of War does not want to take the responsibility of advocating this particular thing.

"MR. DAVILA. I say that we want to extend to Porto Rico the same thing we have in the United States, that is all.

"THE CHAIRMAN. At the conclusion of the meeting, I will appoint a subcommittee with the request that they go into all of these matters and that they consult with Judge Davila. He will be a member of the committee. And I hope they will report to the committee at an early date" (pp. 64-65).

## APPENDIX VII.

SECTION 3224, UNITED STATES STATUTES, IS APPLICABLE IN PORTO RICO.

*Extract from "Brief for Appellee" (this respondent) in these cases, in the Circuit Court of Appeals.*

### POINT I.

THE TRIAL COURT HAD NO JURISDICTION TO ENTERTAIN A SUIT TO RESTRAIN THE ASSESSMENT AND COLLECTION OF TAXES LEVIED UNDER THE "INTERNAL REVENUE LAW OF PORTO RICO."

Revised Statutes, Article 3224 (U. S. Compiled Statutes, 1916, Article 5947) provides as follows

"No suit, for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

We take the position that this article was intended to apply to all taxes levied by and under the authority of Congress, and hence must apply to Porto Rico. This section was originally enacted in 1867 and has always applied to taxes levied by Congress.

*State Railroad Tax Cases*, 92 U. S. 575, 613.

*Dodge v. Osborn*, 240 U. S. 118.

There is considerable doubt as to whether it applies to a suit in a Federal court to restrain the collection of a tax levied by a State.

*Wells v. Central Vermont Ry. Co.*, Fed. Cases No. 17390;

*Schulenberg Co. v. Hayward*, 20 Fed. 422.

But, on the other hand, it has been held to apply to a suit in equity in a Federal court to enjoin the collection of a municipal tax.

*Nye, Jenks & Co. v. Town of Washburn* (C. C. 1903), 125 Fed. 817.

But regardless of the application or non-application of this section to an injunction to restrain State taxes, it clearly applies to Porto Rico.

Porto Rico is an unincorporated territory.

*Balzac v. Porto Rico*, 258 U. S. 298.

As such it is under the direct tutelage and control of Congress, which has plenary power.

*Brunswick Nat'l Bank v. Yankton County*, 101 U. S. 129.  
*Interstate Commerce Commission v. United States*, 224 U. S. 474.

The government of the territory belongs primarily to Congress, and only secondarily to such agencies as Congress may establish (26 R. C. L. 671).

*Mormon Church v. United States*, 136 U. S.  
*Snow v. United States*, 18 Wall. 317.

A State is a sovereign; but a territory is a direct dependency of the National Government. In the last cited case touching the relation of a territory to the United States, Mr. Justice Bradley said:

"Strictly speaking, there is no sovereignty in a territory of the United States but that of the United States itself" (p. 321).

Under the Organic Act of Porto Rico, approved March 2, 1917 (39 Stat. 951), Congress specifically reserves the power and authority to annul any law passed by the Legislature of Porto Rico.

" . . . All laws enacted by the Legislature of Porto Rico shall be reported to the Congress of the United States, as provided in section 23 of this Act, which hereby reserves the power and authority to annul the same. . . ." (Section 34 of the Organic Act.)

In the same section it is provided that if a bill is passed over the veto of the Governor of Porto Rico, it shall be transmitted to the President of the United States, whose veto shall be final.

Every act of the Legislature of Porto Rico, therefore, is in effect an act of Congress itself.

*Snow v. United States*, *supra*, 18 Wall. 317.  
*Binns v. United States*, 194 U. S. 486.  
*De la Rama v. De la Rama*, 201 U. S. 303.

All judicial processes in the Island run in the name of the President of the United States (Organic Act of Porto Rico, Sec. 10). The United States District Court for Porto Rico is not a consti-

tutional court, but is one established by Congress under its power to govern acquired territories.

*Balzac v. Porto Rico*, 258 U. S. 298.

The supreme legislative body of Porto Rico is the Congress of the United States.

*Downes v. Bidwell*, 182 U. S. 244.

The People of Porto Rico do not constitute a sovereign power; all political authority of every nature whatsoever is derived from the Federal Government.

*Snow v. United States*, *supra*, 18 Wall. 317.  
26 R. C. L. 667, 669.

It follows from the above principles of law that the prohibition of section 3224, Revised Statutes, forbidding an injunction to prevent the collection of any tax to be maintained in any court applies directly to the internal revenue taxes of Porto Rico involved in this appeal, which taxes have been levied by the Legislature of Porto Rico, under the direct control and supervision of the Congress of the United States.

The case of restraining a State tax presents a different question. A State is itself an independent sovereignty. The States have all residual powers, and the original thirteen States delegated to the National Government its power. In the case of a territory the delegation of power is in the other direction, and is revocable at will. Congress is the supreme legislative body of the territory, but has delegated a limited amount of power to the Legislature of Porto Rico, over which it maintains close supervision. Congress legislates through the Legislature of Porto Rico, and participates directly in each act by its veto power.

A very close analogy to the relation of Congress to a territory and to the legislative body thereof, is found in the relation of a State of the United States to a municipality or county within its borders, and whose powers are derived from and defined by the State legislature. In *Brunswick Bank v. Yankton County*, *supra*, 101 U. S. 129, Mr. Justice Waite, in discussing the relation of a territory to the central government, said (at p. 133):

"All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. *Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations.*

"Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. *In other words, it has full and complete legislative authorities over the People of the territories and all the departments of the territorial government.*" (Italics ours.)

Could it be successfully contended that a State statute exactly similar to Article 3224 would not apply to taxes levied by a municipality of the State. We believe not. The language of Article 3224 is broad, and is intended to cover *all* taxes levied by or under the authority of the United States.

*Howland v. Soule*, Fed. Cases 6800.

The law says that no injunction shall be entertained to restrain the assessment and collection of *any* tax. The language could scarcely be made more comprehensive, and the act must be taken to mean just what it says, and to lay down a broad and general principle. Certainly the Porto Rican internal revenue taxes are levied under the direct authority and supervision of the Federal Government; which can alter, amend, repeal, substitute or confirm them at will.

There can be no doubt but that the statutory laws of the United States apply to Porto Rico, for it is so stated specifically in Section 9 of the Organic Act of Porto Rico, which reads as follows:

"That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws: *Provided, however*, That hereafter all taxes collected under the internal-revenue laws of the United States on articles produced in Porto Rico and transported to the United States, or consumed in the Island shall be covered into the Treasury of Porto Rico."

Plainly this language extends Article 3224 to Porto Rico, unless it is an internal revenue law. But the very language of this article shows that its subject-matter is judicial, not internal revenue legislation. It has always been considered as of general application. Mr. Justice Miller says in *State Railroad Tax Cases*, *supra*, 92 U. S. 575, on page 613:

"That there might be no misunderstanding of *universality of this principle*, it was expressly enacted in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice. See *Cheatham v. Norvell*, decided at this term; *Nickoll v. United States*, 7 Wall. 122; *Dowd v. Chicago*, 11 Wall. 108." (*first italics supplied*.)

See also,

*McDowell v. Heiner*, 9 Fed. (2d) 120.

JUSTICE MILLER HIMSELF ITALICIZED THE WORDS "*in any case*," THUS INDICATING THE TRUE SENSE OF ARTICLE 3224, WHICH MORE PROPERLY BELONGS IN THE JUDICIAL CODE THAN ELSEWHERE.

*That this article is a separate and general statute is further shown from its history.* It was originally enacted as a part of Section 10 of an act approved March 2, 1867, entitled, "An Act to amend existing laws relating to internal revenue, and for other purposes." (Ch. 169, 14 Stat. at Large, 475.) *But when the United States Statutes were revised, Article 3224 was withdrawn from its context and made a separate article, and the word "any" was inserted before the word "tax."* Clearly, then, Congress must have regarded it as a general statute, and extended it to Porto Rico by Section 9 of the Organic Act, above quoted.

## APPENDIX VIII.

### REGULATIONS OF PORTO RICAN TREASURY DEPARTMENT

#### DEPARTMENT OF FINANCE OFFICE OF THE TREASURER

October 13, 1925.

TO INTERNAL REVENUE AGENTS, COLLECTORS AND OTHERS  
CONCERNED:

#### REGULATION NO. 2

TO AMEND SECTION 1 AND REPEAL SECTIONS 5 AND 8 OF "REGULATION NO. 1 PROMULGATED BY THE TREASURER OF PORTO RICO BY VIRTUE OF THE PROVISIONS OF SECTIONS 65 AND 73 OF ACT NO. 85, KNOWN AS 'INTERNAL REVENUE LAW OF PORTO RICO,' APPROVED AUGUST 20, 1925, FOR MANUFACTURERS AND DEALERS WHO EFFECT SALES SUBJECT TO SECTION 62 OF SAID ACT," APPROVED OCTOBER 1, 1925.

Section 1.—Every person required to pay the tax prescribed by Section 62 of the Internal Revenue Law in force, who sells to any dealer or to any manufacturer articles subject to the payment of the said tax, shall furnish same with an invoice covering each sale, containing the following information: date of sale, full name of purchaser, address of same, each and every article sold (except those not subject to the 2 per cent tax), price of the same, specifying on each invoice the amount of tax collected by him; Provided, however, that the tax shall be collected from the person making the first sale and in the manner hereinafter prescribed. The said invoice shall be numbered consecutively in the order in which the same had been issued and copy thereof shall be kept at his place of business subject to inspection by the Treasurer of Porto Rico or his agents.

Section 2.—Every dealer or manufacturer who makes purchases in Porto Rico from other dealers or manufacturers, shall obtain from the vendor an invoice containing all the information

specified in the preceding section, and shall keep the same at his place of business subject to inspection by the Treasurer of Porto Rico or his agents.

Section 3.—Every dealer or manufacturer who makes purchases upon which the 2 per cent tax has been paid, shall keep a book in which he shall enter the invoices covering such purchases, in the following manner:

- (a) Date of purchase. (As per vendor's invoice.)
- (b) Number of invoice. (The serial number given by the purchaser to the invoice received from the vendor.)
- (c) Full name of vendor.
- (d) Amount of invoice. (Excluding tax.)
- (e) Sales tax paid by vendor.

Section 4.—Every dealer who makes sales the total amount of which shall exceed one hundred (100) dollars a month and all manufacturers, regardless of the total amount of their sales, shall provide themselves with the official book known as "Libro Oficial para la Contribución del dos por ciento Sobre Ventas."

Section 5.—(Repealed.)

Section 6.—The "Declaration of Sales" shall be made out in duplicate by placing a carbon paper between the original and the duplicate, so that the entries made on the original shall clearly appear on the copy thereof.

Section 7.—In the "Declaration of Sales" there shall be entered at the close of business each day the amount of sales made, excluding therefrom those upon which the 2 per cent sales tax has been paid at the time of purchase, and at the close of the month a total of all sales shall be recorded and the tax of 2 per cent on the total amount given, shall be paid in internal revenue stamps, which shall be cut in two, so that one-half of each stamp may be attached to the original Declaration and the other half to the duplicate. The stamp shall be cut so that the serial number appearing thereon in duplicate may remain intact on each half. The stamps shall be cancelled with a dating stamp and the original "Declaration of Sales," duly sworn to, shall be delivered to the Internal Revenue Agent of the district, or to the Collector.

Section 8.—(Repealed.)

Section 9.—The “Libro Oficial para la contribución del dos por ciento sobre las Ventas” (Official book for the payment of the 2 per cent Sales Tax) shall contain sufficient declarations to last one year and upon being used up, the manufacturer or dealer shall fill out the application blank to be found on the next to the last sheet of the book and forward same to the Treasurer of Porto Rico who will furnish a new book. Until this new book is received the last declaration of sales shall be used for the recording of such sales as may be made during the first days of the month, which sales shall be transferred to the new book immediately upon receipt of same.

Section 10.—Manufacturers shall not be exempted from the payment of the 2 per cent tax on the sale of articles manufactured by them and upon which the 2 per cent tax may have been previously paid by the vendor on the raw materials used as component parts thereof, but in computing the tax to be paid by the manufacturer, the tax paid by the vendor on such raw materials or component parts acquired by the manufacturer, shall be considered.

Section 11.—This Regulation shall be effective from and including October 1, 1925.

(Signed) JUAN G. GALLARDO,  
*Treasurer of Porto Rico.*

I, Juan G. Gallardo, Treasurer of Porto Rico, do hereby certify that the foregoing is a true and correct translation of Regulation No. 2 promulgated by the undersigned October 13, 1925.

San Juan, Porto Rico, October 14, 1925.

JUAN G. GALLARDO,  
*Treasurer of Porto Rico.*

# SUPREME COURT OF THE UNITED STATES.

Nos. 211, 212, 213, 214, 215, 216.—OCTOBER TERM, 1927.

T. H. Smallwood, W. F. Smallwood, A. D. Smallwood, et al., etc., Petitioners,

211 vs.

Juan G. Gallardo, Treasurer of Porto Rico.

Adolfo Valdes Ordenez, Salvador Garcia, Victor Ochoa, et al., etc., Petitioners,

212 vs.

Juan G. Gallardo, Treasurer of Porto Rico.

Insular Motor Corporation, Petitioner,

213 vs.

Juan G. Gallardo, Treasurer of Porto Rico.

Adolfo Valdes, Pio Perez, Luis C. Cuyar, et al., etc., Petitioners,

214 vs.

Juan G. Gallardo, Treasurer of Porto Rico.

Finlay, Waymouth & Lee, Inc., Petitioner,

215 vs.

Juan G. Gallardo, Treasurer of Porto Rico.

Angel Abarca Portilla, Rafael Abarca Portilla, Enrique Abarca Sanfeliz, et al., etc., Petitioners,

216 vs.

Juan G. Gallardo, Treasurer of Porto Rico.

On Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[October 24, 1927.]

Mr. Justice HOLMES delivered the opinion of the Court.

These are suits brought in the District Court of the United States for Porto Rico to restrain the collection of taxes imposed by the laws of Porto Rico. On January 7, 1927, the Circuit Court of Appeals affirmed decrees of the District Court dismissing the

bills. On March 4, 1927, by Chapter 503, § 7, of the Act of that year, Congress provided that Section 48 of the Act to provide a civil government for Porto Rico should be amended to read as follows: "Sec. 48. That the Supreme and District Courts of Porto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the District Courts of the United States, and the District Courts may grant writs of mandamus in all proper cases.

"That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Porto Rico shall be maintained in the District Court of the United States for Porto Rico." 44 Stats. 1418, 1421. Writs of certiorari were granted by this Court on May 16, 1927, but argument was ordered on the question whether the cases had not become moot by virtue of that Act.

Apart from a natural inclination to read them more narrowly there would seem to be no doubt that the words of the statute covered these cases. To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun. And although the Circuit Court of Appeals in *Gallardo v. Porto Rico Ry., Light & Power Co.*, 18 F. (2d) 918, 923, with some color of authority has held that the Act does not apply, we cannot accept that view. To apply the statute to present suits is not to give it retrospective effect but to take it literally and to carry out the policy that it embodies of preventing the Island from having its revenues held up by injunction; a policy no less applicable to these suits than to those begun at a later day, and a general policy of our law. Rev. Stat. § 3224. So interpreted the Act as little interferes with existing rights of the petitioners as it does with those of future litigants. There is no vested right to an injunction against collecting illegal taxes and bringing these bills did not create one. *Hallowell v. Commons*, 239 U. S. 506, 509. This statute is not like a provision that no action shall be brought upon a contract previously valid, which in substance would take away a vested right if held to govern contracts then in force. It does not even attempt to validate previously unlawful taxes. It simply makes it plain that these cases are not excepted from the well known general rule against injunctions. It does not leave the taxpayer without power to resist an unlawful tax, whatever the difficulties in the way of resisting it.

The sequence of the clause in the amendment after others giving authority to grant writs of habeas corpus and mandamus shows that it puts a limit to the power of the Court. See *Dodge v. Osborn*, 240 U. S. 118, 119. That is a question of construction and common sense. *Fauntleroy v. Lum*, 210 U. S. 230, 235. Therefore when the District Court required a deposit in the registry of a sum to secure payment of the tax in dispute, the money should be returned as there is no jurisdiction to dispose of it otherwise.

Of course it does not matter that these cases had gone to a higher Court. When the root is cut the branches fall. *McNulty v. Batty*, 10 How. 72.

As the bills were dismissed upon the merits (with partial injunctions in *Valdes v. Gallardo* and *Finlay, Waymouth & Lee, Inc. v. Gallardo*) the decrees should be reversed and the cases sent back with directions to dismiss for want of jurisdiction.

*Decrees reversed and bills ordered  
to be dismissed.*

*Money deposited in Court for pay-  
ment of taxes in case of adverse de-  
cision to be returned.*

Mr. Justice SUTHERLAND was absent.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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